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The Genealogy of Our Maritime Law

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N AMERICAN maritime jurisprudence, there exists a comparatively unoccupied field. I refer to the history or genealogy of our maritime laws, — the antiquity and original jurisdiction of admiralty, if you wish. The word "comparatively" is used, as all American writers have devoted much labor to the subject; but, after all, their works are chiefly valuable as digests of established principles, rules of procedure, the methods and forms of practice arising therefrom, and the like. Mr. Benedict has relieved this situation to some extent, and manifestly all he could in a work chiefly confined to the requirements of the active practitioner.

One, of course, can merely glance at this field in a limited article of this character. I have thought that this humble effort to facilitate such a glance may give the key to brethren at the bar desirous of entering and investigating this most interesting region of our law. All good lawyers think for themselves. They want to know the reasons for a law and the purposes of its origin.

The laws of the sea, and particularly those of the high seas, as contradistinguished from the territorial sea of each country, are essentially international laws. The busy marine lawyer must watch and pursue with diligence any innovation in modern treaties or relations between nations which tend to vary those ancient and mediæval doctrines common to all countries. This is particularly true just now by reason of the great European conflict of arms. Every active practitioner of maritime law must keep reasonably well informed as to the law of each seafaring nation. The best living authorities, both American and foreign will now, I think, concede that in all controversies in the maritime courts of a nation, between the vessels, citizens, and subjects of another nation, the law of the flag of such vessels, or beneath which such persons sail, shall be the law of administration.

I believe it will now be conceded, and if not it should be conceded, that in all controversies between foreigners we should preserve to them the full benefit of their laws, adopting only the law of the forum when the subject-matter or point in question is not covered by the law of the land whose properties or people are concerned. Aside from interna-

tional comity, the spirit of fair play, the law of liberty, the enlightment which inspires us with justness towards all mankind, demand that we be generous and upright in this regard. Hence it is that the laws of each nation of the earth, possessing or in contact with a commercial or military marine, enter into the subject before us.

This great zone of law, both international and local, cannot be satisfactorily explored without keeping in touch with its embryo and growth. To do this one must follow the walks of navigation and commerce from their inception to the present day, paths which, while working out the progress and destiny of the government of the seas, are nevertheless saturated with the blood of all nations, shed for the gratification of commercial avarice and inhuman national pride. When we have established a respectable merchant marine, will it not be possible for America to advance upon a plane which will insure the purposes of God in creating the waters, namely, that the empire of the sea shall be enjoyed with universal freedom by all nations?

Let us now briefly run down the paths of commercial and nautical growth above referred to. In doing so we must keep constantly in mind the origin and development of maritime law in connection therewith.

The precise origin of navigation is enveiled by antiquity in darkness and fable. Those given to mythological fancies have attributed the invention thereof to Minerva. The poet Gessner has in his "First Navigator" delighted the hearts of the esthetic and the romantic by placing this laurel upon Venus, and the French poet Esmenard has introduced this fiction into his poem *"La Navigation."*

We, however, must deal with facts. Eusebius, and the Roman writer Vitruvius, are among the ancients who sustain the Phoenician historian Sanchoniathon in asserting that Ousous, one of the first heroes of Phoenicia, was the first to expose himself to the water, using for such purposes the trunk of a half-burnt tree. Beyond question the origin is with the Phoenicians, who claim an ancestry of over 30,000 years prior to the Christian era. We know from Herodotus that the earliest transports from Tyre and from Sidon, whatever they may have been, were relied upon by the most ancient nations to distribute the wares of Egypt and of Babylon to the remainder of the then known world.

From the dug-out tree trunk the ancient Greeks as well as the Phoenicians developed to the idea of constructing floating woods of various pieces, which they fastened together with wooden pegs and strings cut from skins. This must have been well developed in the days of Ulysses, for Homer, at the 344th verse in the Fifth Book of the "Odyssey," tells us of the raft built by that warrior in the island of Calypso as follows:

"So large he built the raft; then ribbed it strong
From space to space, and nailed the planks along;
These formed the sides; the deck he fashioned last,
Then o'er the vessel rais'd the taper mast,
With crossing sailyards' dancing in the wind,
And to the helm the guiding rudder joined.
Thy loom, Calypso! for the future sails
Supply'd the cloth, capacious of the gales.
With stays and cordage last he rigg'd the ship,
And roll'd on levers, launched her to the deep."

The nautical understanding of ancient mankind became so enlarged by the improvement and development of tree trunks and rafts with which they worked along their shores and between the neighboring islands, that they were finally led to the construction of galleys, with many ranks of rowers, and it was then that they unquestionably ventured to the open sea. The piratical nature in primitive man, and the inherent desires and cupidity of all men, created commerce by sea, necessitating laws to avoid chaos and turmoil in connection therewith.

The historical contact of Phoenicia with the Assyrians, Egyptians, Chaldeans, Persians, and Greeks, all in turn, indicates that, whether at war or in peace, the Phoenicians must have had well-established rules and customs in the gov-

ernment of their merchant and military marine. Unfortunately, ancient historians and mythological composers, both of prose and poetry, throw but little light upon any fixed principles or code in connection with this ancient commerce. The Rhodians were, however, the first to excel in the systematizing of maritime laws, and as their island was frequented by the Phoenicians in their trade with the Ægean it is more than probable that the excellent laws of Rhodes were in a large measure inspired from maritime association with the Phoenicians. Most modern writers, including Benedict, assert that the laws of the Rhodians are the most ancient code of maritime law. Its date is approximately 900 years before Christ. We learn, however, from that great ancient historian, Thucydides, that the Island of Ægina, in the Salonic Gulf, and the Island of Crete, each in turn held the empire of the sea, and regulated their commerce and marine with excellent laws prior to the time when the Island of Rhodes became potential, and covered with her commerce and her galleys all lands and waters known to the Mediterranean world.

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The Rhodians were, however, the first known maritime power to pursue a humane and generous policy towards other nations desirous of following the sea. They became the protectors of nations they might have enslaved, and yet their maritime empire was more absolute than any other nation of antiquity. Other ancient nations imagined themselves masters because they were tyrants of the sea. The shrewd and daring Romans espoused, obtained, and took care to retain the friendship of the Rhodians. Whether we consult the Pandects, the Institutes, or the Digest of Justinian, promulgated many hundreds of years after Rhodes was empress of the seas, it will be found that the inspiring origin of the civil law, as contained in the Books of Justinian, can be traced, as far as maritime rules and principles are concerned, to the laws of Rhodes. As early as 730 years before the Christian era, Persia possessed a military marine that flourished during the days of Darius and Xerxes. The Persians had 600 ships at Marathon and 300 at Salamis. Their defeats by the Greeks in both of these great battles destroyed their maritime power. After her brilliant victories over the Persians, Greece became the empress of the sea. She has given so much intellectual life to the modern world, in both science and art, it would be fair to assume that she should contribute a full quota of maritime law. The maritime laws of Athens and Sparta seem, however, to have been those of Rhodes. This is notably so after her war with Persia and until her empire of the Grecian seas was surrendered to the Macedonians. The conquests by sea as well as by land, of the great Macedonian King Alexander the Great, are known to us all. The Rhodian laws were evidently his guide in maritime commerce, as they were of the Egyptians, the Carthagenians, and the Romans. Carthage became the greatest maritime

commercial center of the ancient world. It has even been suggested that the Carthagenians explored as far as this Western Hemisphere, but this is a vague conjecture resting upon no reliable authorities. The downfall of Carthage came by reason of the same mistaken policy which imbued all ancients, and the most modern maritime powers, namely, the ambition to arbitrarily rule the seas. This ambition brought upon her the vengeance of her equally ambitious and haughty rival, Rome, and through the medium of the Punic wars the Romans made the Carthagenians their vassals. Then commenced the rapid growth of Roman commerce by sea, and the coextensive forming and development of all branches of the civil law bearing upon maritime rules and principles.

Rome ruled the sea not only within the pillars of Hercules, but when Caesar dominated the government of Gaul, the Romans caused ships to be constructed stronger than ever before, and ventured therewith upon the navigation of the Atlantic Ocean. We learn from Plutarch's life of Caesar that he was preparing to further increase the marine of Rome, and to further perfect its laws, when he fell in the Roman Senate, beneath the daggers of his assassins.

Before considering the maritime laws and statutes of modern nations, who claimed, and for a time held, the empire of the sea prior to the discovery of this new world, let us briefly consider maritime law as left us by the ancients above referred to. Bear in mind we are still in the galley age, with no accessories to the oars other than primitive sails and rigging. This continued almost down to the discovery of the mariner's compass, to which I will refer later. Bear in mind, also, that in the early periods of navigation and commerce the limited number of laws was by reason of the limited commerce. The growth and development of marine law was then, has since been, and will continue to be, proportionate between the two. Many of the ancient maritime laws remain as mere local ordinances, and obsolete with us for practical purposes. On the other hand a large number of them, and notably the Rhodian and Roman laws have, by reason of their great wisdom and unquestionable equity, become a part of the common maritime law of all nations. As above indicated, Rome must yield to Rhodes the glory of creating her reliable maritime law. The Rhodian laws were held in such high veneration by the Romans that they were referred to by Cicero and other eminent Roman Senators and lawyers as such, without having their names changed to the laws of Rome, which change would have been in line with the central absolute policy of that nation. Augustus legalized them by giving them the formal sanction of Rome, but before the reign of that emperor they were held in such high veneration that they were not required to be engraved upon the twelve tablets, but were filed, referred to, and adopted in their original condition. We to-day without thinking of, and possibly without being conscious of, the fact, are constantly applying the laws of Rhodes and Rome. For example, the law of *Collationem* was contained in chapters 33–39 and 40 of the Rhodian laws, and as adopted by the Romans in section 1 of law 2, and laws 3 and 5 in title two of libre 14 of the Digest *ad legem Rhodiam de jactu* is identical in principle with our present law of general average. The right to jettison and to recover contribution therefor by reason of tempests, which were much more injurious to them by reason of their frail and undeveloped crafts, was general among the ancients. Contracts similar to our bottomry and respondentia bonds were also necessarily practised by them. Barratry and thefts of all kinds seem to have been common among the Roman sailors, and the Prætors made special provisions covering punishment therefor; the right of action *ex quasi delicto* was also provided, and in such an action the master and owner could be condemned to pay double the value of the article stolen. The Roman laws gave actions for single, double, triple, and quadruple damages in such cases according to the circumstances. See title 6 in book 4 of the Institutes. Tribonian, an eminent Roman lawyer, and the favorite and counselor of Justinian, was employed by that emperor to digest and codify all Roman laws.

This he accomplished, with the aid of nine other lawyers, in three years' time. The fourteenth book of their Digest speaks of maritime contracts in seven laws, two published by Ulpian, three by Paul on the Edict, one by Gaius on the provincial edict, and one by Africanus taken from the eighth book of his questions. In this last it is provided that the *exercitor navis* or owner of the ship, who receives all her earnings for his own benefit shall be condemned by the prætor to fulfil all obligations contracted by the *magister navis* or master of the ship, whether they concern freight, ship, or cargo. This is the same, and it is even broader than all our modern *in personam* remedies. If the scope of this paper would permit, many similar instances could be given. Seizures of the ship and goods were permitted to enforce compliance, thereby practically covering all of our modern remedies *in rem*.

The Emperor Justinian was undoubtedly the restorer of Roman jurisprudence, and his works, executed by Tribonian, Dorotheus, Theophilus and other learned lawyers, are comparatively modern, and almost as accessible as other maritime authority. He published his code in the 529th year after Christ, and again in 533, and the last edition of his Digest and Institutes in 534, the novels or addenda thereto being published from time to time until 565. These are all well preserved to the present day. Their worst fault is their prolixity. Nearly 100 years before Justinian, the Theodosian Code was published by the Roman Emperor Theodosius II. and it is full of maritime law, most of which was adopted by Justinian. Theodosius laid down the laws governing navigation on the Danube and the Rhine. He also established law pertaining to public transports, sailors' wages, shipwrecks, salvage, and the like. The Roman Emperor Basil published the Basilica in A. D. 877, in forty books. He covers nearly all of the Justinian marine laws, and the eighth title of the Bascilica contains forty-eight chapters covering the laws of the Rhodians as they had been preserved by the Greeks and Romans for nearly nineteen centuries. These were continued by the Emperor Leon, the successor to Basil, and were in vogue down to the decline and fall of Rome as a world power.

While the ancients above referred to were developing maritime law in the southern seas of their known world, the barbarians adjacent to the Baltic and North Sea must also have had their laws to control a merchant marine. Many writers are in doubt as to this. There, however, can be no doubt of their having built and navigated ships. Tacitus, who lived from the fifty-fourth to the one hundred and twenty-fifth year after Christ, and who was the greatest and most reliable of Roman historians, informs us that the *Sueones* (the Latin for the Swedes) were surrounded by the seas and were powerful on the ocean, and that their vessels were even better and more easily navigated than those of the Romans, for the reason that they had double prows, so they could touch the land without being turned about. See *Tacitus de Maribus German, cap.* 44.

The modern ports and states which enjoyed the empire of the sea and established marine laws before the discovery of America were in turn Venice, Genoa, Pisa, The Goths, Vandals, Saracens, and Normans. In 1096 and thereafter the Pisans, Genoese, and Venetians were all instrumental in furnishing ships to the princes and religious fanatics of Europe for the purpose of outfitting and pushing the Crusades. Since the discovery of America, Portugal, Spain, Holland, France, and England have in turn asserted supremacy upon the seas, enacted many maritime laws, and given us many able writers upon international and maritime law. The student is referred to the marine history of these states and nations for much information and knowledge bearing upon the maritime jurisdiction of the United States. In addition to the maritime laws of other European countries and ports, to which I shall presently refer, we find the laws of the Romans and Rhodians running through them all.

In an article necessarily confined such as this I can only hint at the sources of information upon this most interesting and imperfectly developed subject. I am writing most of that ancient realm and those remote sources of maritime

law which by reason of modern maritime invention and advancement are rapidly passing beyond the memory and reach of men.

The comparatively modern marine codes or systems of maritime law consist of the *Consolato del Mare*, the Amalfitan laws, the laws of Oleron, Wisbuy, Marseilles, the Hanse-Towns, those of Venice, Tuscany, Genoa, Sardinia, Naples, the Ottoman laws, the laws of the northern states of Europe, and the maritime laws of Russia, Denmark, Sweden, Antwerp, Portugal, Spain, and Belgium, Holland, and The Codes of Italy and the German Empire and the laws of France and England.

Of these the most instructive, and those of any considerable importance to us in America, is, first, the *Consolato del Mare*. This compilation has 294 chapters. The time and place of its origin are unknown. Grotius and Marquardus fix it during the Crusades, and consider it was framed by order of the ancient Kings of Arragon. Others equally eminent attribute it to the Pisans. I favor this latter view, as Pisa was very high in maritime affairs when the *Consolato del Mare* was, in the eleventh and twelfth centuries, adopted as recognized maritime authority by all Europe. They in a large measure followed the Rhodian and Roman laws.

Second. The laws of Oleron. These are sometimes attributed to the English King Richard I. This is an injustice to the French. Selden, the great English writer on maritime law, is responsible for it. See p. 462, Cap. 24, Book 2 of Selden's *Mare Clausum*. Selden caused Blackstone to make the same mistake. Eleonora, a French lady and the mother of Richard, created the *Role d'Oleron*. She was the Duchess of Guienne, and established those laws before she married Richard's father, King Henry. They are called after the Island of Oleron, but 6 miles from the French coast near Rochelle. Eleonora, when in the Holy Land, observed how the *Consolato del Mare* was respected throughout the Levant. She therefore resolved to have the marine rules and judgments of the West complied as law, and it was done before she became an English queen. It was published in 1150. Richard did not come to the throne of England until 1189. So it is impossible for either Selden or Blackstone to be correct. The universal eminence of these authorities has made the error a very popular one. It should be set right, as the *Jugement d'Oleron* should not be considered from a standpoint of English law. It is French law, following the civil law, largely taken from the *Consolato del Mare*, and they in turn from the laws of Rhodes and Rome. Further, they relate solely to navigation in the sea of Gascogny from Bordeaux to Rouen, without referring to the Irish sea or parts of the ocean which England improperly regarded as her exclusive domain. The greatest cast of English law which can be given to them is that Richard subsequently introduced his mother's laws into England, but this cannot justify American lawyers in referring to them as original English maritime authority, which is continuously being done in our courts.

Third. The laws of Wisbuy, called after a Swedish port on the island of Gothland in the Baltic sea. They controlled in the Baltic and North seas in the twelfth and thirteenth centuries, and were the rules of decision in Denmark, Sweden, and among the Baltic powers for years thereafter. They are full of the principles perpetuated by the ancients.

Fourth. The Hanse-Towns laws originated in Bremen in 1164, and were the maritime authority of the Hanseatic Confederacy until the last century, and they are still largely the modern basis of the Prussian and German maritime law.

Fifth. France and England have given us much maritime law. One of the strangest things, however, about modern maritime jurisprudence, is that England, for many years the greatest of all maritime nations, has never clearly systematized nor codified her maritime rules and decisions. Her "Merchant Shipping Act" is the nearest approach thereto. I mention this, as it increases the difficulties surrounding the full mastery of maritime law as it comes to us in our present day.

Sixth. Holland follows largely Wisbuy and the Hanse-Towns.

Seventh. Spain still wisely clings for her basic rules to the *Consolato del Mare*, as do all the modern Mediterranean countries, states, and ports above referred to.

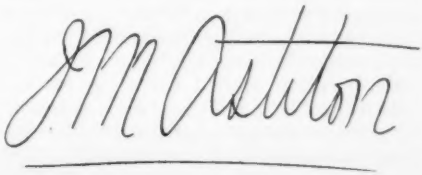
In comparatively modern times there were two great events which entered into the expansion and caused diversity in maritime law. One was the discovery of the mariner's compass. The other, the discovery of America. While the discovery of the compass belongs to France, Prince Henry, son of John I., King of Portugal, was the first to grasp and expand the great advantages to navigation and commerce by the use of the compass. Mariners under him, and other navigators, who in the fourteenth century were rapidly developing astronomy as well as the uses of the compass, became very daring and venturesome. This led to larger and stronger ships, and to the construction therein of greater conveniences as to provisions for extended voyages, and the like. While the Portuguese, armed with the astralabe and the compass, were roaming and exploring the coasts of Africa, the Spaniards, who had built a powerful marine under Ferdinand and Isabella, struck out for the westward. Genoa, Pisa, and Florence have never been accorded their proper quota of glory in the discovery of the new world. They furnished Spain with many of her best sailors and ships. Columbus himself was an intrepid, capable, and enterprising sailor from Genoa, and Americus Vespucius, who in 1497 stamped his Christian name upon the entire Western Hemisphere, was a Florentine. These well-known events are merely referred to, as investigation will show that they led to the adoption of enlarged rules and principles of marine law by nearly every maritime nation of that age. The aeroplane, submarine and the like will compel important innovations in admiralty rules and jurisdiction.

It will be perceived from what I have said that throughout all epochs, both ancient and modern, the great codes of maritime law have advanced, flourished, then become almost obsolete, according to the advancement or decline of the maritime power governed thereby.

In nearly every case this decline has arisen from false pride and avarice asserting and attempting to maintain absolute dominion over the sea,—efforts so fallacious that it is to be wondered how modern nations continued their pursuit. The seas were intended by the Creator to be as free to all mankind as the air. *Every nation which has resisted this edict of the Almighty has met with disaster and decay. Mare Liberum* is the only true and stable doctrine.

The coast line and such inland waters or straits as pertain to the territorial sea of each nation and *ex necessitate* require the protective marine power thereof, is, and should be the only exception.

During the last few years we hear expressions of thoughtless and mistaken patriotism to the effect that the Pacific and sections of the Atlantic must and should become an American ocean, and the like. We are increasing our Navy. The burning need of increasing our merchant marine is under way. Let us have a care that as the days of our greatness increase we do not reach the zenith of our glory by perhaps unconsciously exercising despotism over the seas. If the tremendous power of the American nation is exerted towards equal right upon every ocean, at all times, and for all nations, it will go far to promote our maritime laws and commerce. It will also go far to benefit mankind by perpetuating the basic principles and doctrines of our government, and rendering impossible upon the Western Hemisphere the inhuman cataclysm of war which now threatens to engulf the Eastern.



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Admiralty and Maritime Law

Its Antiquity; Original Jurisdiction; and Jurisdiction in the United States

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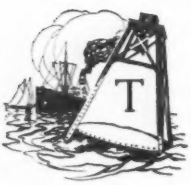

THE general admiralty and maritime law is in its character and operations an international system, having for its basis the law of nature and nations. It is, therefore, closely allied to and in many essential particulars inseparable from that international system of law which deals with the rights and obligations of independent states in their relation to and intercourse with each other; especially, in their treaty obligations affecting maritime commerce and navigation. Not unlike that system, it, too, is subject to such modifications and qualifications as each nation may determine upon, whether necessitated by its situation, or suited to the exigencies of its commerce. As thus modified and qualified it becomes the law of that particular country, for its own internal administration and external relation. This must not be understood as giving to the maritime statutes of other countries an extraterritorial effect; it is only when they have received the common consent of mankind, and have been acquiesced in as a rule of general obligation, that they will be judicially noticed, and, if not repugnant to the law of the land, will be followed. But foreign municipal law, as such, must, of course, be proved as facts. Where countries have been acquired by the United States, its courts will take judicial notice of the laws which prevailed there up to the time of such acquisition, as such laws are not deemed foreign, but are held to belong to an antecedent government.

Although every maritime nation has adopted the essential principles of the great mass of general maritime law as the basis of its system, there is also noted in their respective laws such varying shades of difference which, while corresponding to the peculiar requirements of each particular country, do not affect the harmony and consistency of the common maritime law.

The law of the sea rests upon the concurrent sanction of those nations which may be said to constitute the commercial world; and while it is true that many of the usages now recognized as of universal obligation may have originated in a positive prescription of some single state, as the Rhodian laws, the ordinances of the Hanseatic League, various provisions of the maritime ordinances of Louis XIV., etc., which were prescribed for certain respective states, they became of general authority; this was not because of their origin, but because accepted and assented to as a desirable part of the general maritime system of nations.

As the ocean is common to all nations, it is proper and essentially convenient that its law should be also common to all who travel this "high road of nations."

In time of peace the pacific provisions of this system are referred to as the laws of commerce and navigation, and in time of war the rights of belligerents and neutrals are determined by that branch of this jurisprudence which relates to prize.

Every principle of maritime law is indissolubly linked with maritime commerce; hence it is that matters which do not relate to commerce and navigation have no place in this system. Maritime commerce is an essential entity in the creation and maintenance of political bodies, and has therefore always held

an important position in the legislation of every maritime nation. It is this commerce, sustained by maritime law, which unites all nations and climates; it is this which is the very life of the state, because of the wealth it brings back in return for the commodities it sends abroad.

So, it has been said by an eminent writer, many years ago, that "in the decisions of sound reason maritime law has no limits, except in the lamentable necessity of retaliation—in the arbitrary edicts of free nations against each other; it cannot, therefore, be too emphatically repeated, that it is of incalculable importance to the preservation and prosperity of nations, in time far distant, that those who make or administrate law in maritime affairs should be men of learning, science, and integrity."

The antiquity of maritime law rests with a period of time more remote than that of any other existing system. So ancient, indeed, are many of its fundamental principles and rules, that it has become axiomatic that he who would be fully advised thereof must delve into its earliest codes and ordinances of thousands of years ago. As was stated in a decree handed down by the late Chief Justice Marshall, "cases in admiralty are as old as navigation itself, and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

The origin of the art of navigation is enveloped in fable and veiled in the deepest obscurity. The ancients have attributed the invention of the means of navigation to numerious deities of antiquity, among whom the greatest number ascribe it to Minerva.

It is believed that canoes, made from the trunk of a tree, known among the ancients as monoxyla, must have been the first means of navigating on water, and that success in this led to the discovery of the art of constructing rafts of two or more pieces. Of these Quintilian says: "If those who came after the ancients had done nothing more than to imitate them, we should still navigate on rafts."

Sanchoniathon says that Ousons, who was one of the first heroes of Phœnicia, took a half burnt tree, cut off its branches, and was the first to expose himself upon the water; and to this Vitruvius attributes the birth of navigation.

The Phœnicians were the first to make long voyages, and the first to arm their vessels for war. They readily availed themselves of the advantages of a marine and thereby soon secured an extensive commerce. In time they assumed the empire of the sea, a sovereignty they long continued to enjoy, during which time they became tyrants of the sea, and exercised piracy. They were the first sea pirates known to history.

After the Phœnicians, the Aeginetes, and then the Cretans, assumed dominion of the sea during various epochs, but it remained for the inhabitants of the island of Rhodes to create, digest, and promulgate the first system of maritime laws of which we have any authentic knowledge. So great was the success they attained, their code has always been referred to as the "cradle of maritime law." Nevertheless, as far back as the reign of King Hammurabi, who was a contemporary of Abraham, 2,250 years before Christ, we find in the Code of Hammurabi numerous sections which fix the obligations arising under contracts for boat building, hire or charter of vessels, transportation of goods for hire, collision, etc., and the principles there laid down are, in many instances, recognized at the present time as the rule of decision.

The Persians, and then the Greeks in turn, succeeded the Rhodians as masters of the sea. These two countries maintained large fleets of war vessels, called by the ancients, as a class, "vessels of force," as distinguished from their merchantmen or "ships of burthen." The great naval battle of Salamis, fought by these countries, in which it is said over fifteen hundred vessels took part, followed by that of Platæa and of Mycale, demonstrated to the Greeks, with the success of their arms, the immeasurable value of sea power. They lost no time, and spared no efforts in the creation of a still greater navy, and adopted measures they deemed judicious in furthering the interests of their merchant marine. Among other things they established a

special jurisdiction at Athens, to pass upon maritime transactions. But, notwithstanding their one time undisputed claim to sovereignty of the sea, and their assiduous efforts to further their shipping interest, in which they were eminently successful, there is no authentic data that they ever formed an authoritative digest of maritime law, although posterity is indebted to them for much intellectual light. With the flight of time and the ever-enduring ambition among maritime countries to acquire dominion of the sea,—a passion which has existed in man from a period of time obscured in the long dim past, which has many times over and again caused the sea to run red with blood, —we find one country after another arrogating to itself this sovereignty, —an elusive power which has proven to be the making and unmaking of nations.

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The necessity of omitting from this brief article a discussion of the numerous maritime codes, excepting to repeat here what was said by Chancellor Kent of the French Maritime laws known as the Ordonnance de la Marine of Louis XIV., that they are a "monument of the wisdom of his reign far more durable and more glorious than all the military trophies won by the valor of his armies;" and eliminating a review of the early English admiralty jurisprudence, which, notwithstanding restrictions and limitations, exercised powers of a most extensive and diversified character; and without following the course of the common-law courts of England, in their persistent, and what proved to be a long-continued controversy and attack upon this court, because the courts of admiralty were distinctly civil law courts in their methods and course of procedure, administering, too, a system of law which, in its every essential particular, was and is civil law, wherein questions of fact were determined without the intervention of a jury, which was and is opposed to the sacred fundamental principles of common law, and because the common-law judges, as a rule, lacked a proper conception of the excellence of the admiralty laws and practice, and were so deeply imbued with narrow prejudice against this "foreign system and practice," and as deeply jealous of its popularity with those engaged in maritime commerce and navigation; — eliminating all these things brings us to the colonial vice admiralty court, which existed in America. These courts were created by the King's commission; and right here it should be noted that the authority of the King's commission extends throughout his dominions, whereas the statutes of the Imperial Parliament, under the British Constitution, have no force or effect in the colonies unless they are expressly named; and so it was prior to and at the period of the Revolution. Consequently, the various acts of Parliament and the decisions of the common-law courts thereon had no application by themselves, to impose a limitation on or restriction of the authority of the colonial courts. Their jurisdiction depended upon the terms of the King's grant, and this was

interpreted by the Colonial courts to give them a jurisdiction over maritime transactions and affairs such as the most ardent supporters of the admiralty courts were struggling to obtain in England. There was, in certain cases, a right to an appeal from this court to the English court of admiralty.

Briefly, the commissions which were issued to the judges of the vice admiralty courts provided, among other things, a grant of "full power to take cognizance of and proceed, in all causes, civil and maritime, and in complaints, contracts, offenses, or suspected offenses, crimes, pleas, debts, exchanges, policies of assurance, accounts, charter parties, agreements, bill of loading of ships, and all matters and contracts which in any manner whatsoever relate to freight due for ships, hired or let out, transport money or maritime usury (otherwise bottomry), or which do any ways concern suits, trespasses, injuries, extortions, demands, and affairs, civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchants and other persons whomsoever, with such owners and proprietors of ships or other vessels whatsoever, employed or used, or between any other person howsoever had, made, begun, or contracted for any matter, cause, or thing, business or injury whatsoever, done or to be done as well in, upon, by, the sea or public stream, or fresh waters, ports, rivers, creeks, and place overflowed whatsoever, within the ebbing and flowing of the sea, or high-water mark, as upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, emergencies, dependencies annexed and connexed cause whatsoever, and such cause, complaints, contracts, and other premises aforesaid, or any of them, howsoever the same may happen to arise, be contracted, had, or done, to hear and determine (according to the civil and maritime laws and customs of the high courts of admiralty of England . . . also, duly search and enquire of and concerning all goods of traitors, pirates, manslayers, felons, fugitives, and felons of themselves and concerning the bodies of persons drowned, killed, or by any other means coming to their death in the sea, or in any ports, rivers, public streams and creeks and places overflowed, . . . concerning all casualties at sea, goods wrecked, flotzon, jetson, lagon, shares, things cast overboard and wreck of the sea, and all goods taken, or to be taken as derelict, or by chance found or to be found; and all other trespasses, misdemeanors, offenses, enormities, and maritime crimes whatsoever done and committed, or to be done and committed, as well in and upon the high sea, as all ports, rivers, fresh waters, and creeks and shore of the sea to high-water mark, from all first bridges towards the sea . . ."

The preceding extract is given to show the extent of the admiralty jurisdiction which was exercised in the colonies by these courts, under the King's grant,—a jurisdiction which was never restricted by the grantee nor by an act of Parliament. The acts which limited the jurisdiction of the English courts of admiralty did not include the colonies, hence, the jurisdiction which prevailed in this country was at no time the very much embarrassed jurisdiction of the English courts. The grants expressly conferred jurisdiction over "all causes, civil and maritime," and then proceeded in specific terms to cover maritime contracts and torts generally.

With the inauguration of the Revolution each one of the confederated states took over to itself all the powers of sovereignty, and continued in the exercise thereof with the exception of those matters which they conferred by their articles of confederation upon the general government. It, therefore, devolved upon each state to erect its own court of admiralty. Where such courts had previously existed, they were, in most instances, continued, and the judge thereof was given a simple commission as judge of the court of admiralty. In those states where no statutes were enacted to indicate the jurisdiction of this court, it exercised the powers and authority possessed by the vice admiralty courts; but some of the states undertook to define this jurisdiction, and as each state acted therein independently of the others, the result was a marked divergence in their

power and authority, instead of a uniform jurisdiction throughout the states.

New York enacted a statute which was an exact copy of the 15th Richard II. But Virginia provided that the court of admiralty "shall have jurisdiction of all maritime causes except those wherein parties may be accused of capital offenses." It was still further provided that this court should be "governed in their proceedings and decisions by the regulations of the Congress of the United States of America, by the acts of the General Assembly; by the laws of Oleron, and the Rhodian and Imperial Laws, in so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and nations." This was construed as a declaration for the general admiralty and maritime law previously observed, rather than the then beleagured jurisdiction of the English court of admiralty, which was at that time assailed on every side.

New Jersey, too, stood for the broader jurisdiction. In establishing a court of admiralty, this state granted its jurisdiction to extend over all cases of prize capture and recapture upon the water, from enemies, or by way of reprisal, or from pirates, and of all controversion suits and pleas of maritime jurisdiction, according to the maritime law and law of nations, and to the ordinances of the Honorable, the Congress of the United States of America, and of the laws of that state. In some of the states the admiralty jurisdiction was made subject to a prohibition from the Supreme Court in like manner and effect as the prohibition of the court of King's bench in England.

It is manifest that the diversified jurisdiction which obtained among the different confederated states resulted in anything but a uniform practice or jurisdiction, or application of maritime law. Hence, in the controversies which were waged over the meaning of the clause "all cases of admiralty and maritime jurisdiction," inserted in the Federal Constitution, it was not possible to ascertain what was meant thereby from a resort to the rules, procedure, and laws applied, and limitations imposed or observed in any one state.

Prior to the execution of the Articles of Confederacy Congress instituted a prize court. Some doubt was at first expressed about the right to establish it, but its creation was finally held to be an exercise of due authority.

With the adoption of the Federal Constitution the judicial power of the United States was made to extend "to all cases of admiralty and maritime jurisdiction." This, of course, like other grants contained in the Constitution, is not self-operative. It became necessary for Congress to provide a judiciary and to vest therein, or in some branch thereof, the authority to exercise this jurisdiction. This it practically did in the judiciary act of 1789; therein it was provided, among other things, that the district courts "shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of 10 or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." The jurisdiction thus conferred, in so far as it relates to civil causes, follows the language of and is, to that extent, coextensive with, the constitutional grant.

Upon the ascertainment of the scope of this grant depends the extent of the authority of the courts of admiralty. In the determination of the extent of this grant many heated and acrimonious controversies were engendered, and waged with all the vigor possessed by many of the great intellects which graced the bench and bar of early days.

On one hand it was insisted that the framers intended to embrace only such matters as were cognizable in the restricted and very much embarrassed jurisdiction of the English admiralty,—a jurisdiction which was referred to as the fluctuating decisions of the English common-law judges, which "are founded in no uniform principle, and exhibit illiberal jealousy and narrow prejudices." It was soon realized, however, that before anything certain could be ascer-

tained about this jurisdiction it would be necessary to fix upon a definite date in its tabid existence. Should it start at the time the Revolution was inaugurated, or at some period of time anterior thereto, or at the time the Constitution was framed; because with every prohibition which issued from the common-law courts, from time to time, this jurisdiction met with further limitations. Or, again, as insisted upon by others, with more show of reason, did the framers contemplate the more extended powers conferred upon the colonial courts, or, finally, as was eventually decided in the affirmative, did the framers of the Constitution have reference to all cases of admiralty and maritime jurisdiction which were embraced within that jurisdiction wherein the terms "admiralty" and "maritime" applied to any system of laws originated, and wherein they comprehend a well-established significance. In fact, the only jurisdiction wherein "all cases of admiralty and maritime jurisdiction" were entertained; a jurisdiction which had survived through centuries the test of trial, and was then exercised in the maritime countries of continental Europe,—a system which was founded upon natural justice and designed to meet the exigencies of commercial intercourse. "That jurisdiction, in short, which collected the wisdom of the civil law, and, combining it with the usages of the sea, produced the venerable Consolato Del Mare, and still continues in its decision to regulate the commerce and intercourse and the welfare of mankind." This question was not settled without severe contests occasioning a noteworthy dissimilarity of profound opinion among the judges of the district courts, in the first instance, to be thereafter waged before and among the justices of the Supreme Court of the United States.

Of the many cases arising within the admiralty jurisdiction under the maritime law, the English admiralty court, at the time of the Revolution, entertained but very few. In fact, less than that of any other admiralty jurisdiction. The colonial vice admiralty courts, under their special grants, exercised a larger jurisdiction, but not so extensive as that of the early English admiralty courts. But the French admiralty courts and other maritime courts of continental Europe possessed a jurisdiction sufficiently broad to entertain "all cases of admiralty and maritime jurisdiction."

The words "admiralty" and "maritime" were both used in the Constitution, to, no doubt, prevent a restricted interpretation which would exclude any case of admiralty or maritime jurisdiction. At the time the Constitution was framed, these words had an accepted meaning,—a meaning in which they were understood by the commercial world during a period of time extending over centuries,—a meaning the framers of the Constitution must be considered as cognizant of and familiar with at the time they framed the clause in question.

The saving clause contained in the judiciary act above referred to, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it," is intended merely to preserve the remedy or rights of action in those courts which proceed, and only where they proceed, according to the course of the common law, as distinguished from admiralty proceedings.

This clause is not intended to confer jurisdiction upon the state courts in respect to anything. It does nothing more than save to the suitor whatever remedy or right of action lawfully exists at common law. It preserves to the suitor the concurrent jurisdiction of the common-law court in actions cognizable in admiralty, where only a common-law remedy is sought.

The purpose and object of the saving clause is to save to the suitor who is entitled to proceed *in rem* in the admiralty, or to proceed *in personam,* or both *in rem* and *in personam* where permissible, in the same jurisdiction, the right to elect not to go into the admiralty at all, but to resort to such common-law remedy as the common-law court is competent to give.

Most common-law remedies both on contract and civil tort, and suits *in personam* in the admiralty, are akin to each other, and in this respect the two jurisdictions may be said to be concurrent. But there is no form of action at common law which can be regarded as a con-

current remedy when compared with the proceeding *in rem* of the admiralty.

If the common-law court has jurisdiction over the parties it may entertain a suit *in personam* for the purpose of affording such a remedy as is incident to the powers of that court and according to the common law, irrespective of the fact that the subject-matter of the contract is maritime, and may even relate to services to be performed or civil torts occurring upon the high seas.

The admiralty courts of the United States are vested with jurisdiction over suits between foreigners, if the subject-matter of the controversy, whether sounding in contract or tort, is maritime, and the person or thing sought to be impleaded as a defendant can be reached by its process. But cognizance of all such suits rests within the sound discretion of the court.

In a case where both parties are citizens or subjects of the same country, and it would operate a grievous hardship to either party, or tend to defeat the ends of justice if the parties should be remitted to their home tribunal, the court will, as a matter of comity between nations, entertain such a cause.

Where the parties are of different nationalties, there is less hesitancy to act, and if the injury or service occurs or is rendered on the high seas, there is no good reason, simply because the parties are foreigners, why those who are injured or who perform the service should ever be denied justice in our courts. If, however, for some manifest reason it shall otherwise appear inexpedient to entertain the cause, the court should decline to exercise jurisdiction. But these cases are deemed pre-eminently *communi juris,* and nothing short of strong grounds should appear to induce a court to deny its aid to a foreign suitor when it clearly has jurisdiction of the property or party charged.

In suits between foreigners of different nations on a cause or right of action arising on the high seas, the court will apply the general maritime law as administered by it, with few exceptions. One of these is that the person in charge of either vessel is not open to blame for conforming to the rules of navigation prescribed by his own country as a course of conduct in navigating his vessel on the high seas. Still another exception arises to the rule in cases where the nations to which the respective vessels belong have mutually adopted, as a part of their maritime law, identical provisions at variance with the maritime law as administered by the forum before which the case is brought. The court should follow such provisions where they are applicable to the case, because with reference to the parties it concerns and whose rights are to be determined in an admiralty court, it is the maritime law which they mutually acknowledge.

In a leading case taken up from Louisiana, questions arose with respect to what law should control on a charter-party entered into in that state, where, too, the voyage stipulated by that charter-party commenced. The parties were an American, resident of that state, and an Englishman, resident of London, England. On the one hand it was urged that the law of the state should control, especially with reference to the stipulation for payment of damage on the breach of that contract; on the other hand it was contended that the contract being maritime, it must be presumed (nothing to the contrary appearing) that the law maritime was intended by the parties to control. This cause came before Judge Pardee, of the circuit court, who has done much to settle many important questions with respect to admiralty and maritime law and procedure. This eminent jurist held that the United States courts, in the exercise of admiralty and maritime jurisdiction, are required, under the Constitution of the United States, "to follow the general principles of the admiralty and maritime law, as they are recognized and prevail in the commercial world." On appeal, the United States Supreme Court held with Judge Pardee, and laid down the broad rule, that the law of the state does not control such a situation whether treated as a question of construction of the contract of the parties, or as a question of judicial remedy. That Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage must be presumed to look to the general maritime

law of the two countries, and not to the local law of the state in which the contract is signed; and as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states.

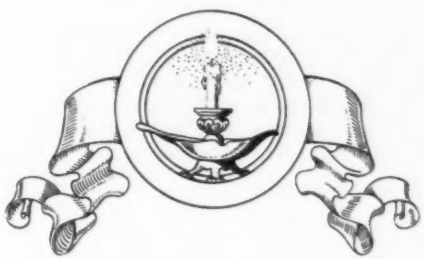
There are many Louisiana cases wherein the decisions have done much to create and settle present recognized fundamental principles which make for a uniform admiralty and maritime law, procedure, and remedy throughout the United States, and it is with much gratification we have noted that Judge Foster, of the district court at New Orleans, because of his practical experience and extensive knowledge of maritime affairs is especially fitted for and has maintained that high standard of excellence in the admiralty courts for which this district is noted.

Admiralty and maritime law is unlike mere municipal law, in that it is an elastic system, which yields to the application of those broad and enlightened principles of equity and justice which may be necessary to meet new conditions as they arise within the purview of this jurisprudence. It affords relief where the principles of an equity system would relieve, but the strict rules of common law cannot. It is said by the Supreme Court of the United States, that courts of admiralty, when carrying into execution maritime contracts and liens, deals with them upon equitable principles and with reference to the necessities of trade.

This rule is not confined by the admiralty court to cases of contract alone, but includes every cause within the scope of its powers. Whenever the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, although a court of law could not, it is the duty of the court of admiralty to grant relief.

It has been said by an eminent jurist, that "we ought not to betray so much vanity as to take it for granted that we can establish more salutary and useful regulations than those which have, for ages, governed the most commercial and powerful nations, and led them to wealth and greatness." So, therefore, "if by our own municipal laws there are rules established, our courts are bound exclusively to follow them; but in cases where no such rules are instituted, we should resort to the regulations of other maritime countries, which have stood the test of time and experience, to direct our judgment as rules of decision."

John D. Grace



The Sea Lawyer

I've sailed the ocean blue, I guess, for nigh on forty years,
I've laughed with South Sea Islanders and cried equator tears.
But, mark me well, although the life is certainly not fair,
It beats th' land, fer havin' Peace, and sartin' legal care.
In town th' Local Judge, says he:—"Bill Johnson—YOU once more!"
And Me, sez I:—"Judge speak it out—I know you've got th' floor."

Once let th' sails bulge out with wind and salt spray douse me eye;
And Courts, from here to Tim-buck-too can never ask me:—"Why?"
Sea lawyers take a fellow's case once he gets back to port
And onct a year you do your bit like any landsman sport.
But days speed on an' months drift past, with only sea and space
And nary run of legal lore to poke you in th' face.

I mind that time when Me and Jim put in at Hoola Sound;
Hawaiian gals kept teasin' Jim and yankin' him around.
And Jim—he grabbed one purty lass and kissed her, fair an' fine,
With all them grumpy native guys a-watchin', down th' line.
Before we knowed it—Bing! A cop—(They have 'em on th' Isle)
And Both of us was pinched fer fair fer stealin' of a smile.

Sea Lawyer—sure—he got us out. That's when they come in great
But these here dry land shyster kind are sure to seal yer fate.
I rec-collect down Hon Kong way we rammed a Ke Ying boat
And six big yellow pig-tailed ghouls was tearing at me throat.
I stuck up one and knocked down four but, somehow, in th' fuss,
Their local Law, such as it is, got speedy wind of us.

A Chinese Court, or Courts Japan, ain't nothin' for to brag,
But off we got, as slick as oil—with pearls—and other swag.
Twas HIM, as done it—Him as waits, around each blooming port
An' for a pinch of Transvaal gold will help th' troubled sort.
And so it goes, th' Four Seas 'round, from Boston out to Nome;
I'd ruther be pestered by ONE Sea-shark than all uv th' bunch 't home.

Th' minute that I pays my fine or serve my little term,
And, Judges wise—er otherwise, give way to search fer sperm.
When, in me face, th' Trade Winds blow—th' canvas whips a song,
And God, Himself, smiles at th' breeze that sends our craft along.
Then—then serene content I know—my legal woes is o'er.
I'd ruther face ten thousand sharks than them I meets on shore.

W. Livingston Larned.

Workmen's Compensation Acts and the Maritime Law

BY CHARLES E. KREMER

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MANY of the states bordering upon the sea, lakes, and other navigable waters have passed what are known as workmen's compensation acts, the objects of which are to provide medical treatment, care, maintenance, and compensation for employees who are injured or killed while in the employment of certain specified employers.

Without much difficulty a man injured can readily ascertain whether he and his employer come within the provisions of the workmen's act of a particular state. There is, however, one important exception. It is this: Does a seaman injured while in the service of the ship while the latter is in port come within the workmen's compensation act of the state in which he is injured?

In nearly all of the workmen's compensation acts I have read, the act embraces employers engaged in transportation by land or water. On the face of the statute the employer who is a shipowner is clearly within the terms of such act. This would be true were it not for the maritime law of the United States.

The maritime law of the United States is the common law of the sea, and having been adopted by the courts of the United States it becomes, like the common law in the different states, the law of the land. In all cases coming under the act of Congress providing remedies for injuries to employees of railroads engaged in interstate commerce, the remedies provided by Congress superseded all remedies provided by state laws. In case of an injury to a seaman in the service of the ship there is no Federal statute which covers the subject of his compensation or care; and if the maritime law is not the paramount law, then his case may come within the workmen's compensation act of the state. The question then is: Is the maritime law paramount, or, in other words, has it the same force and effect that a Federal statute would have? The maritime law, like the common law in the states where it has been adopted, has the force of a statute, if not in conflict with one, and it is the law in every case until a statute supersedes it.

The subject of ships on the navigable waters of the United States and the high seas, their construction, inspection, and employment, the seamen who navigate them, and the navigation laws and rules of the road at sea, are familiar legislation of Congress, and admittedly so under the commercial clause of the Constitution. Congress would clearly have the power to pass acts applicable to seamen employed on ships on navigable water of the United States, of similar import as the state workmen's compensation acts; and such acts would, of course, supersede all state legislation on the same subject.

The maritime law as stated by the Supreme Court in the case of The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, holds and limits the liability of the shipowner for injuries sustained by a seaman while in the service of the ship, to the cost of cure and maintenance, and does not hold for any consequential damages unless there was personal neg-

ligence of the owner. Cure and maintenance extend only so far as medical skill can provide a cure, and when the seaman has been cured of his wounds, though he be thereby disabled, the compensation for maintenance ceases. The seaman's recovery to the extent of cure and maintenance does not depend upon the shipowner's or the vice principal's negligence. It is as complete, even though the seaman may himself have been negligent, unless he was guilty of wilful or gross negligence. This being the seaman's right of recovery on account of his injury or illness incurred while in the service of the ship, under the maritime law, it is obvious that this is not in harmony with his rights and remedies at common law, or under the workmen's compensation acts of the states, and the question as to which law shall prevail becomes important and interesting.

The act of Congress of March 4th, 1915, provides:

"In any suit to recover damages for an injury sustained on board vessel, or in its service, seamen having command shall not be held to be fellow servants with those under their authority." To this extent Congress has recognized the claim of seamen for personal injury. It is fair to assume that this was in the light of the maritime law. We may now proceed to the discussion of the maritime law. The judiciary act of 1789 grants admiralty jurisdiction to the United States district courts in these words: "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

This implies a known jurisdiction, as is said by Judge Brown in the case of The City of Norwalk, 55 Fed. 98, 105: "The grounds of implication, briefly stated, are that the Constitution, in extending the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous states; that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intend to reserve to themselves a legislative power over the same subject; and that Congress must therefore be the only body competent to make any needed changes in the general rules of the maritime law."

In the case of The Lottawanna (Rodd v. Heartt), 21 Wall 572, 22 L. ed. 661, the Supreme Court has said:

"Each nation adopts the maritime law, not as a code having any independent or inherent force *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens that from the general practice of commercial nations in making the same general law the basis and groundwork of their several maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world. . . .

"This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it on the just and logical grounds upon which it is accepted, and, with proper qualification, received with the binding force of law in all countries. . . .

"That we have a maritime law of our own, operative throughout the Union, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. . . . The Constitution does not define the precise limits of the law thus adopted. . . . It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. . . .

"One thing, however, is unquestionable,—the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." Speaking of this, Judge Hughes, in the case of The Manhasset, 18 Fed, 918, 922, says: "From all that has been said, these things would seem to be clear: First: That the maritime law, existing as it does by the common consent of nations, and being a general law, cannot be changed or modified as to its general operation by any particular sovereignty."

CHARLES E. KREMER

"We have thus arrived at the particular question involved in the case at bar. As a general proposition, a state of this Union has no power to affect the law maritime, either by addition, subtraction, or alteration. To acknowledge the authority of a state of this Union (not sovereign in its power over commerce) to change in any particular the maritime law would be in the end to destroy that law as a system of jurisprudence, by subjecting ships of commerce to a different law in every American port which they might enter."

Many more citations could be given, but the limits of this article will not permit it. There are numerous instances in which state laws have provided liens, rights of actions, and remedies relating to ships and their use, but these are limited to instances as to which the maritime law is silent and for which it made no provision, and therefore such instances were not in conflict. Such legislation must not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with the proper harmony and uniformity of its international and interstate relations. Instances of new rights being created by state laws are: Liens for domestic supplies (The Lottawanna [Rodd v. Heartt], 21 Wall. 558, 22 L. ed. 654); for master's wages (Whitney v. The Mary Gratwick, 2 Sawy. 342, Fed. Cas. No. 17,591); refusing to load under charter (The J. F. Warner, 22 Fed. 342); liens for wharfage (The Virginia Rulon, 13 Blatchf. 519, Fed. Cas. No. 16,974), and many others. In all these cases there was no conflict with the maritime law.

In the interests of interstate commerce and its uniformity, the rule of maritime law is much the most salutary. It goes with the ship into every state, and her owner and the ship's and seamen's interests are best served by one law, instead of as many different laws as there are states to whose ports she is bound. A ship is a roamer, she is here to-day, and to-morrow away and in some other state. The workmen's compensation acts would be difficult to enforce against such transient rovers. The maritime law, however, follows her from state to state

and port to port, and can be enforced against her wherever she may be.

The authorities establish:

First, that there is a maritime law of the United States, declared and adopted by the Supreme Court of the United States.

Second, that it cannot be altered, changed, or amended by the legislatures of the states.

Third, that it is therefore paramount as against state law.

Fourth, that, so far as determined and adopted by the courts of the United States, it has the force of an act of Congress.

Fifth, that state laws in conflict with it must give way to it.

Sixth, so far as the maritime law provides for the compensation of seamen who are injured in the service of the ship, it governs even as against the common law or a state statute on the same subject.

Seventh, the maritime law applies while at sea to a case of injury, and in the same manner while in port.

A recent decision directly in point on the question is the case of Schuede v. Zenith S. S. Co. 216 Fed. 567. In this case Judge Killits, at Cleveland, held that the maritime law governed the case of personal injury of a seaman on board ship, and that the case was not governed by the workmen's compensation act of Ohio. See also The Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891.

We have not taken up or discussed cases of the death of a seaman due to injuries received, or the rights which might arise in such a case, as the limits of this article will not permit, except that what has been said here does not embrace cases of death of seamen killed while in the service of the ship, because as to these the maritime law is silent, and there is no Federal statute which gives a right of action in case of death. On this point even courts of admiralty have enforced the laws of the states in which the death occurred. See The Hamilton (Old Dominion S. S. Co. v. Gilmore), 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133.

Charles E. Shumaker

The Lawyer's Museum

Come to the lawyer's museum,
Of which his lips are ever dumb;
Behold a storehouse where repose
Rare secrets that he only knows.

In yonder nook now gaze upon
A hateful family skeleton,
Its bleaching wickedness laid bare,
The gift of some unhappy pair.

And characters of black are here
That white unto the world appear,
Yet masked beneath an evil shell
Strut forth in glory to excel.

Within yon alcove dim and deep
Fond lovers' secrets sweetly sleep,
And here in hideous array
Life's tragedies are on display.

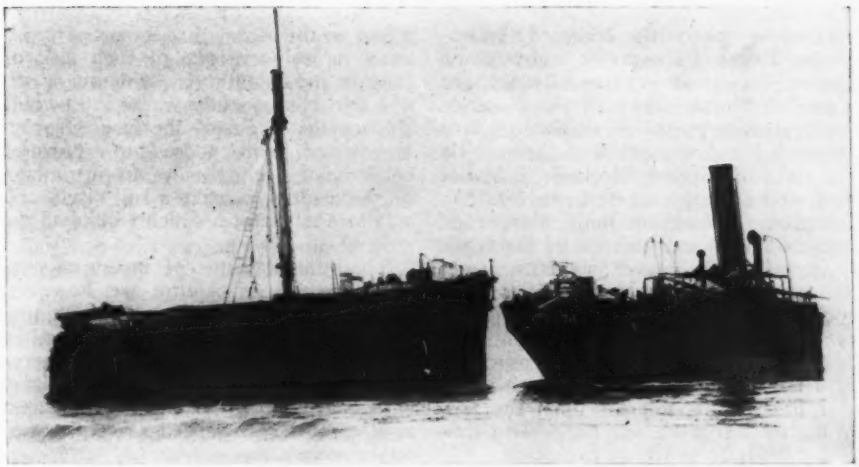
Tales from the inner side of life,
Of cruel husband, erring wife,
And such as misery afford,
Within another niche are stored.

Behold a harmful badge of shame
Concealed to save a noble name,
Or shield the innocent from woe
That only libertines should know.

And when these hidden things you've seen
Remember such have ever been,
And e'er shall be—as lawyers say,
Concealed until God's judgment day.

Wm. D. Fletcher

Seattle, Wash.



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SHIPWRECKED WHILE KEEPING CLOSE IN SHORE TO AVOID GERMAN MINES.

In one day three ships were thus wrecked at Rothsay. The picture shows one of them, the Blanca, ashore and broken in halves.

Marine Insurance and War Risks

BY EDWIN S. OAKES

OUCHING the Adventures and Perils which we the Assurers are contended to bear, and do take upon us, in this Voyage,"—so runs a policy of insurance set out in the earliest book on the subject written in the English tongue,[1] and so runs the standard or Lloyds policy of the present day,—"they are of the Seas, Men or War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments, of all Kings, Princes, and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come, to the Hurt, Detriment, or Damage of the said Ship, etc., or any Part thereof."

"Men of war . . . enemies . . . letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments[2] of all Kings, princes, and people"—it is evident that war risks are prominent among those from which the assured desires indemnity. Nor does he do so without reason. Property at sea, whether belonging to neutrals or belligerents, is in time of war peculiarly exposed to the risk of capture or de-

[1] Magen, Ins. (1755).

[2] In Thompson v. Read, 12 Serg. & R. 440, it is said that there seems to be a difference between arrest, restraint, and detainment. "An arrest operates immediately on the subject arrested, so does a detainment; for it supposes the subject detained to be in the hands of the detainer; but there may be a restraint where the subject restrained is not in the hands of the restrainer. Capture includes an arrest; capture, strictly speaking, is generally made for the purpose of condemnation; but neutrals are often arrested and carried into port for the purpose of investigation. An embargo is a detainment as well as a restraint; but a blockade may be a restraint without arrest or detainment."

tention by one or the other of the opposing forces. The public highways of the sea, free to all in times of peace, are patrolled by the navies of the contending nations; ports of destination are blockaded and voyages broken up. To the risks of capture, blockade, interdiction, and embargo, modern warfare has added the submarine mine, dangerous alike to friend and enemy, and the deadly torpedo. Whatever rights neutrals and noncombatants may be entitled to in theory, in practice they have ever yielded to the exigencies of the belligerents.

New situations and changing practices give rise to new questions. Each great war has left its impress upon the law of marine insurance, and the present war is not likely to prove an exception. Already novel questions as to the liability of the insurer of marine policies for losses occasioned by the war have been raised in the English courts. At such a time, therefore, it is peculiarly appropriate to examine the present state of the law on the subject. It is interesting to note that this law, much of which was made during the Napoleonic struggle and our own War of 1812, bears the impress of some of the most illustrious of our American jurists,—Kent, Parsons, Marshall, and Story.

It has been held that, in the absence of any stipulation in the policy to the contrary, a general policy of insurance covers war risks of all kinds and of all countries,[3] belligerent as well as neutral property;[4] and accordingly that insurance against "the risk contained in all regular policies of insurance" covers loss by capture.[5]

These cases go on the assumption that the insurer fixes his premium with a view to all possible risks which the property insured may be called upon to run. But there is another line of cases which assume that the insurer fixes his premium on the theory that the property insured is subject only to such risk of capture and detention as evidently exists, and that consequently where the ownership or the origin of the insured property is such as to expose it to capture or condemnation, there is a duty incumbent on the insured to make a full disclosure, a failure to perform which will avoid the policy.[6]

The general terms of insurance covering the risk of capture are, however, to be understood as virtually containing an exception of such captures as may be made by the authority of the government of the insurers,[7] or by a cobelligerent,[8] as a contract to indemnify against such capture is regarded as contrary to public policy.

If after the commencement of the voyage insured a war breaks out between the country of which the assured is a citizen and a foreign country, the policy is not vacated, and the insurers are liable for the loss arising out of the state of war.[9] Where insurance is made before the commencement of hostilities but when everybody expects war immediately, the insured is not bound to give the underwriter notice, though the ship did not sail until after war was declared, since, although the risk has increased since the taking out of the policy, it was in view when the policy was written.[10]

But in order to render an insurer against the consequences of hostilities liable, it is essential that the policy shall have attached. Thus, the insurer of a cargo against capture is not responsible for loss arising from a resale of the cargo at the port of loading, even though the underwriters notified the insured that if the cargo was sent they would take the position that the assured deliberately

[3] Barnewall v. Church, 1 Caines, 217, 2 Am. Dec. 180.

[4] Hodgson v. Marine Ins. Co. 5 Cranch, 100, 3 L. ed. 48; Murray v. United Ins. Co. 2 Johns. Cas. 263; Elting v. Scott, 2 Johns. 157; Straas v. Marine Ins. Co. 1 Cranch, C. C. 343, Fed. Cas. No. 13,518; Buck v. Chesapeake Ins. Co. 1 Pet. 151, 7 L. ed. 90.

[5] Levy v. Merrill, 4 Me. 180, where it was held that extrinsic evidence was not admissible to prove the contrary.

[6] Bauduy v. Union Ins. Co. 2 Wash. C. C. 391, Fed. Cas. No. 1,112; Kohne v. Insurance Co. of N. A. 6 Binn. 219; Union Ins. Co. v. Stoney, Harp. L. 235; Stocker v. Merrimack M. & F. Ins. Co. 6 Mass. 220.

[7] Furtado v. Rogers, 3 Bos. & P. 191, 6 Revised Rep. 752, 14 Eng. Rul. Cas. 125; Kellner v. Le Mesurier, 4 East, 396, 1 Smith, 72, 7 Revised Rep. 581; Gamba v. Le Mesurier, 4 East, 407, 7 Revised Rep. 590; Ex parte Lee, 13 Ves. Jr. 64.

[8] Brandon v. Curling, 4 East, 410, 1 Smith, 72, 7 Revised Rep. 581.

[9] Saltus v. United Ins. Co. 15 Johns. 523.

[10] Planche v. Fletcher, 1 Dougl. K. B. 251.

caused any loss occasioned by the perils insured against, since the vessel not having set out to sea with the cargo, the risk insured against never began to operate.[11]

The fact that goods were shipped in the name of the insurer to protect them from seizure by the enemies of the country of the insured does not render the policy void.[12]

The forces of a rebel government may be considered as enemies within the meaning of a policy of marine insurance against acts of enemies;[13] and the words, "capture and detention," apply not only to takings by enemies or pirates, but to those made by friends or allies.[14]

Insurance on a vessel, expressed as being "only to cover those risks excluded by the 'warranted free of capture, seizure or detention' clause in marine policy or policies," must be considered as referring to marine policies generally, and not merely other marine policies insuring the vessel for the same voyage.[15]

The assured is bound to disclose to the insurer the presence on board the vessel of papers which increase the risk of capture and condemnation, unless the use of such papers is customary.[16]

[11] Kacianoff v. China Traders' Ins. Co. [1914] 3 K. B. 1121, 83 L. J. K. B. N. S. 1393, 19 Com. Cas. 371, 111 L. T. N. S. 404, [1914] W. N. 245, 30 Times L. R. 546.

[12] Levy v. Merrill, 4 Me. 180.

[13] Monongahela Ins. Co. v. Chester, 43 Pa. 491.

[14] Murray v. United States Ins. Co. 2 Johns. Cas. 263.

[15] Northwestern S. S. Co. v. Maritime Ins. Co. 161 Fed. 166.

[16] Livingston v. Maryland Ins. Co. 6 Cranch, 274, 3 L. ed. 222; Barnewall v. Church, 1 Caines, 217, 2 Am. Dec. 180; LeRoy v. United Ins. Co. 7 Johns. 343.

Where the nature of the cargo and the falsity of the ship's documents with respect to her port of destination are not matters which would have influenced a reasonable underwriter, and did not enhance the risk, the insurance was not invalidated for failure to disclose to the underwriter the fact of the false clearance, where the cargo was known to the underwriter to be of a character which would probably be treated as contraband in case of capture, and the policy contained express permission for the ship to run a blockade, and the measures taken to conceal her destination did not increase, but tended to lessen the risk. Northwestern S. S. Co. v. Maritime Ins. Co. 161 Fed. 166.

And if according to long-established adjudications of the belligerent courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed.[17]

The assured is not bound to disclose an apprehension of capture unless the danger is so imminent as to be likely to increase the risk.[18]

Liability of Insurer as Affected by Warranties.

— of Seaworthiness.

An English case was held that a neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality;[19] but a doubt has been expressed by Chancellor Kent[20] as to whether it is a part of the implied warranty of seaworthiness that a vessel shall have her proper documents on board.

— of Nationality and Neutrality.

It is customary for underwriters, in times of war at least, to restrict their liability by inserting in the policy various warranties and exceptions, such as the warranty against contraband trade, the construction of which will presently be considered, or a warranty of neutrality, or, what amounts to the same thing, where the assured is of a neutral nation, a warranty of nationality. A warranty of nationality or neutrality is not equivalent to a mere exception of the risk of capture; but is a warranty in the proper sense of the term, so that its falsity will vitiate the contract, though the loss happens in a mode not affected by that falsity.[21]

The description of a vessel as being of a certain nationality is an implied warranty thereof where nationality is ma-

[17] Marshall v. Union Ins. Co. 2 Wash. C. C. 357, Fed. Cas. No. 9,133.

[18] Marsh v. Muir, 1 Brev. 134, 2 Am. Dec. 648.

[19] Steel v. Lacy, 3 Taunt. 285, 12 Revised Rep. 658.

[20] In Elting v. Scott, 2 Johns. 157.

[21] Woolmer v. Muilman, 1 W. Bl. 427, 3 Burr. 1419; Rich v. Parker, 7 T. R. 705, 4 Revised Rep. 552, 14 Eng. Rul. Cas. 149.

terial to the risk;[22] and the assured may not show that the underwriters were informed at the time of their subscription of the true nationality of the vessel, and that the ostensible nationality was assumed to avoid capture.[23]

A representation in the body of the policy stating the goods insured to belong to citizens of a certain nation, in fact neutral, amounts to an express warranty that the goods are neutral property at the time of the contract.[24] But insuring a ship by an English name does not amount to a warranty or a representation that she is an English ship. If the premium is governed by the ship's nationality, the underwriters must ask for information, and not trust in the name.[25]

A warranty of neutrality in strict construction only imports that the property belongs to a neutral person, but has been extended so as to require that the vessel shall be furnished with all those documents which are the proof of neutrality,[26] and that no act will be done on the part of the assured to forfeit the neutral character.[27]

Likewise, a warranty that the property insured is of a certain nationality means that it is not only so in fact, but that it shall be clothed with the requisite evidence of its national character for the purpose of protection, and in reference to the law of nations, under the sanction of which the voyage in question is to be conducted.[28] So, if a ship be warranted American she must not only belong to Americans, but must in every respect be so documented to entitle herself during the whole of her voyage to the privileges of the American flag.[29] It is not enough that the vessel has the necessary documents on board, but they must be produced when needed to save the vessel from condemnation.[30] A warranty of nationality is absolute, and not made good by a colorable furnishing of documents intended to prove the vessel of the nationality named.[31]

A warranty that a ship is American, or British, does not require the ship to have an American or British register, as the case may be, but it is sufficient that she is owned by a person or persons of that nationality.[32] So, a warranty that a vessel is an American, or "an American bottom," does not mean that she is American built, or even that she is an American registered vessel, but only that she is the property of an American subject.[33]

To prove a warranty that the ship insured was of a particular nation, it is prima facie evidence that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port.[34]

Although a warranty of neutrality relates to the conduct of the voyage as

[22] Goix v. Low, 1 Johns. Cas. 341; Murray v. United Ins. Co. 2 Johns. Cas. 168; Higgins v. Livermore, 14 Mass. 106; Atherton v. Brown, 14 Mass. 152; Lewis v. Thatcher, 15 Mass. 431; Barker v. Phœnix Ins. Co. 8 Johns. 307, 5 Am. Dec. 339.

[23] Atherton v. Brown, 14 Mass. 152.

[24] Walton v. Bethune, 2 Brev. 453, 4 Am. Dec. 597.

[25] Clapham v. Cologan, 3 Campb. 382.

[26] Wilcocks v. Union Ins. Co. 2 Binn. 574, 4 Am. Dec. 480; Blagge v. New York Ins. Co. 1 Caines, 549; Schwartz v. Insurance Co. of N. A. 3 Wash. C. C. 117, Fed. Cas. No. 12,504; Smith v. Delaware Ins. Co. 3 Wash. C. C. 127, Fed. Cas. No. 13,035 (reversed upon other grounds in 7 Cranch, 434, 3 L. ed. 396); Ludlow v. Union Ins. Co. 2 Serg. & R. 119; Cleveland v. Union Ins. Co. 8 Mass. 308.

[27] Wilcocks v. Union Ins. Co. 2 Binn. 574, 4 Am. Dec. 480; Schwartz v. Insurance Co. of N. A. 3 Wash. C. C. 117, Fed. Cas. No. 12,504; Smith v. Delaware Ins. Co. 3 Wash. C. C. 127, Fed. Cas. No. 13,035; Maryland Ins. Co. v. Woods, 6 Cranch, 29, 3 L. ed. 143; Cleveland v. Union Ins. Co. 8 Mass. 308.

Where property is warranted neutral, it is incumbent upon the underwriters to show that it was not accompanied by proper documents. Ludlow v. Union Ins. Co. 2 Serg. & R. 119.

[28] Barker v. Phœnix Ins. Co. 8 Johns. 307, 5 Am. Dec. 339.

[29] Baring v. Clagett, Bos. & P. 215, 5 East, 398, 14 Eng. Rul. Cas. 155; Coolidge v. New York Firemen Ins. Co. 14 Johns. 308; Schwartz v. Insurance Co. of N. A. 6 Binn. 378; Calbreath v. Gracy, 1 Wash. C. C. 219, Fed. Cas. No. 2,296.

[30] Murray v. Alsop, 3 Johns. Cas. 47.

[31] Lewis v. Thatcher, 15 Mass. 431; overruling an implication to the contrary in Higgins v. Livermore, 14 Mass. 106.

[32] Barker v. Phœnix Ins. Co. 8 Johns. 307, 5 Am. Dec. 339; Griffith v. Insurance Co. of N. A. 5 Binn. 464; Mackie v. Pleasants, 2 Binn. 363.

[33] Wilson v. Backhouse, Peake, N. P. Add. Cas. 119; Griffith v. Insurance Co. of N. A. 5 Binn. 464.

[34] Arcangelo v. Thompson, 2 Campb. 620, 12 Revised Rep. 758.

well as to the ownership of the property, the insurer may nevertheless be liable where the un-neutral conduct falls within the description of a risk insured against. Thus where, in a policy expressly insuring against barratry, the assured warrants the property neutral, the insurer is liable for the consequences of un-neutral conduct which amounts to barratry.[35]

A warranty of neutrality does not impose upon the insured the obligation to claim property when captured, but he may thereupon abandon to the insurer.[36] Such a warranty does not require compliance with the peculiar regulations of a belligerent state not warranted by the law of nations or by treaty between the belligerent and neutral countries.[37] Under such a warranty, it is sufficient that the property is neutral when the risk commences, and the warranty is not falsified because the subsequent breaking out of hostilities gives it a belligerent character.[38]

The mere act of carrying a belligerent's goods is no breach of neutrality,[39] because the law of nations does not prohibit the carrying of enemies' goods in neutral vessels; but if the neutral endeavors by false appearances to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent whom he thus endeavors to protect, and the increase of risk of being carried in for adjudication is produced, not by a legal act as in the case of the carriage of belligerent property, but by a fraud on the neutrality of the government of the assured and upon the rights of the belligerent.[40]

But a warranty of neutrality in a policy on cargo is violated where the general agent of the assured, though without the knowledge or consent of his principal, accepts belligerent property to be carried in the same vessel, notwithstanding it is plainly distinguished.[41]

If the interest of one joint owner of a cargo is insured, and that interest is neutral, it is no breach of the warranty of neutrality if the other joint owner whose interest is not insured is a belligerent.[42] But a warranty of neutral property is broken by an assignment of part of the subject insured to a belligerent, though after capture.[43]

A warranty of nationality is not complied with when, owing to the domicil of the owner in a belligerent country, the property insured is liable to seizure,[44] even though he resides there only for purposes of trade and with the settled intention to return.[45]

(To Be Continued)

[35] Wilcocks v. Union Ins. Co. 2 Binn. 574, 4 Am. Dec. 480.

[36] Gardere v. Columbian Ins. Co. 7 Johns. 514.

[37] Pollard v. Bell, 8 T. R. 434, 5 Revised Rep. 404; Bird v. Appleton, 8 T. R. 562, 5 Revised Rep. 468, 13 Eng. Rul. Cas. 547; Price v. Bell, 1 East, 663; Nonnen v. Reid, 16 East, 176; Siffken v. Lee, 2 Bos. & P. N. R. 484, 9 Revised Rep. 676.

[38] Eden v. Parkison, 2 Dougl. K. B. 732; Tyson v. Gurney, 3 T. R. 477.

[39] Barker v. Blakes, 9 East, 283.

An indorsement on the order of insurance, that "although our advices give us no reason to believe there will be any articles contraband of war on board the ship Budget, still, as we wish to be covered against all possible risk, we request your reconsideration of the written application including articles contraband of war," is not equivalent to a warrant of neutrality. Maryland & P. Ins. Co. v. Bathurst, 5 Gill & J. 159.

[40] Schwartz v. Insurance Co. of N. A. 3 Wash. C. C. 117, Fed. Cas. No. 12,504; Schwartz v. Insurance Co. of N. A. 6 Binn. 378; Blagge v. New York Ins. Co. 1 Caines, 549.

[41] Phœnix Ins. Co. v. Pratt, 2 Binn. 308; Pratt v. Phœnix Ins. Co. 1 Browne (Pa.) 152.

[42] Livingston v. Maryland Ins. Co. 6 Cranch, 274, 3 L. ed. 222.

[43] Goold v. United Ins. Co. 2 Caines, 73.

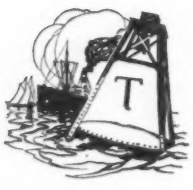
[44] Elbers v. United Ins. Co. 16 Johns. 128; Arnold v. United Ins. Co. 1 Johns. Cas. 363.

[45] Tabbs v. Bendelack, 4 Esp. 108, 3 Bos. & P. 207, note.

Salvage

BY GEORGE L. CANFIELD

Of the Detroit Bar



THE law of salvage has developed from the policy of encouraging the rescue of property at sea, and is one of the most ancient subjects of the maritime law. Such services on land will seldom, if ever, create any right to compensation in the absence of a contractual engagement by the person benefited by them, but, if rendered at sea, will be amply rewarded by a court of admiralty. The right to salvage compensation does not depend upon contract, express or implied, although there may be a contract of salvage without impairing the essential rights of the parties. The mere fact of rescue of property in danger at sea creates a right to compensation, and imposes upon what is saved a corresponding liability. This liability is primarily *in rem*. It may extend *in personam*, as against the owner who requests the service, or who receives back the property after the service has been rendered.

Generally, salvage cannot be claimed by those already under obligation to perform the work. The property must be maritime in its nature. It must be in danger, either actual or reasonably apprehended, and success is essential. The typical salvage service is that of those who voluntarily rescue a ship or her cargo from peril at sea, at risk to themselves or their property, and successfully bring the results of their work into a port of safety. All the interests benefited by the work must respond for its compensation, and salvors are secured by maritime liens of the highest rank upon all of the property saved.

An interesting illustration of this branch of the law, in its practical operation, may be traced through the several cases of the "Bangor" in the Federal reports. This barge, with an importation of sugar, came into New York harbor and was in danger of destruction by fire. The steam tug "Townsend" rescued ship and cargo, and its exertions also resulted in the collection of freight for the carriage of the cargo, and in the collection of duties on the shipment by the United States. The salvors obtained settlement from the owners of the barge for their claim for saving it (69 C. C. A. 603, 137 Fed. 456); they libeled the cargo and obtained a corresponding award (108 Fed. 277); they then sued the United States for salvage on account of the duties which had been collected upon the rescued sugar (130 Fed. 480) and were successful, the decree being affirmed by the court of appeals (69 C. C. A. 603, 137 Fed. 456), and again, on certiorari, by the Supreme Court (202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648). These cases present a clear application of the underlying doctrines of salvage in admiralty law, as that the mere voluntary rescue of property from perils at sea creates a legal liability upon every part of it for equitable compensation, and that while the entire liability will attach to the things saved in the first instance, the owner becomes personally liable by accepting them, notwithstanding he has not entered into any contract on the subject.

The great majority of salvage cases relate to the ship and cargo, since those are the most usual forms of property at sea. The interests so benefited are generally hull, freight and cargo. Each is liable for a salvage award. This liability is several, and not joint. Neither can be held for the proportion of the other, although all may be joined in a single suit, and if one pays more than its own proportion it can have contribution from the others accordingly.

Salvage services are usually rendered by numerous parties; as, for example, the master and crew of the rescuing ship. The doctrine is that all who par-

ticipate in the work shall participate in the award according to their share in the operation. Hence the usual participants are the shipowner, master, and crew. If the ship has been the important instrumentality, the owner will receive the greater share of the compensation, sometimes the whole, as where the ship is designed for such work and the crew hired for that purpose. If, on the other hand, the greater part of the work is done by members of the crew, theirs will be the proportionate share of the award. Usually, the award is a lump sum, or percentage of the property, and this will be distributed among the crew according to rank, pay, and merit. In The Rasche, L. R. 4 Adm. & Eccl. 127, 42 L. J. Prob. N. S. 71, 22 Week. Rep. 240, for example, there is an instance of a large award to members of the crew. The Scythia met the Rasche, abandoned on the North Atlantic, and put her own mate and three sailors on board. These men succeeded in navigating the Rasche into Liverpool. The salvage award was about $16,000. The mate received $3,000 of this, and the sailors $2,500 each. The owners of the Scythia received about $3,000, and her master and remaining members of the crew divided the remaining $2,500 according to their ratings.

Occasionally, a passenger may be the sole salvor, as in The Great Eastern, 2 Asp. Mar. L. Cas. 148. This ship was, in her day, the largest of the Atlantic passenger steamships. During a voyage in September, 1861, her rudder was disabled, and she lay quite helpless in the trough of the sea for several days. All the devices of the master and engineers failed to steer her, and her situation became very dangerous. Among the passengers was a civil engineer who then proposed a plan of his own and it was adopted by the master with the result that the ship successfully reached port. The court awarded the passenger $15,000. But this case would not warrant any general rule that every passenger who assists in accomplishing the safety of his ship will be treated as a salvor. One essential element of salvage service is that it is voluntary, that is outside of what one is bound to do. Now, up to a certain point, the maritime law requires passengers to work for the safety of the ship, if a common danger arises. In such a situation, where all are in peril, it becomes the duty of each to render all the assistance he can. The authority of the master may become supreme. Thus, in The Vrede, Lush. 322, 30 L. J. Prob. N. S. 209, the claims of passengers who assisted in saving the ship by pumping, after she had been damaged by collision, were rejected. The same rule will, ordinarily, preclude any of the crew of the imperiled ship from claiming salvage; it is their duty, ordinarily, to render all the services for which salvage could otherwise be claimed.

The amount of salvage which is awarded depends upon the circumstances of each case and the sound discretion of the court. It is considered that public policy requires the encouragement of rescuing property in peril at sea, and therefore the compensation is not limited to the ordinary rates of work and labor. The court endeavors to be liberal in order that others may be inclined to similar endeavors, and, at the same time, to be just to the owners of the property saved. In a note to The Lamington, 30 C. C. A. 271, 57 U. S. App. 653, 86 Fed. 685, there is an instructive collection of salvage awards in the Federal courts. In many instances these exhibit a percentage basis, often reaching 50 per cent where the property salved was derelict, that is, totally abandoned at sea. A few show an even higher amount, but these are generally unusual and extraordinary in their circumstances.

The ingredients of the service which may be material to the amount of the award may be numerous, as the degree of danger to life and property, the value saved, the skill displayed by the salvors, the danger to which they exposed themselves or their own property, their own loss and expense, and the time given to the work. The last item may be very small without lessening the award if large results follow from quick, successful operations. Dr. Lushington once aptly said, in response to an argument for a small charge because the work had taken only a little space of time, "I am at a loss to conceive why a patient should

complain of the shortness of an operation."

Salvors are expected to exhibit great good faith in their dealings with the subjects of their work. The courts treat them with favor when this element is present and are correspondingly severe when it is not. Not infrequently appear cases where the salvor has taken advantage of the situation to drive a hard bargain with the ship in distress, as for an excessive compensation. Judge Story's vigorous language in The Emulous, 1 Sumn. 207, Fed. Cas. No. 4,480, is still sound law:

> "No system of jurisprudence purporting to be founded upon moral or religious, or even rational, principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive, and exhorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice."

They must deal very honestly with the property, and have no right to appropriate any of it to their own use. Their best course is to promptly surrender it to the court, under a libel for salvage. They have no right to retain possession as against the owner. The law protects their right to compensation by a maritime lien, which has no relation to possession, and which can only be displaced by an admiralty sale or their own laches in enforcing it.

The American law of salvage is to be found entirely in the adjudged cases with the exception of the short Federal statute on the subject which took effect, by its terms, July 1, 1912, and was approved August 1, of the same year. An important clause in this act is the one creating a two-year limitation for salvage suits. The cases are very numerous and exhibit many interesting circumstances of human conduct. The picturesque or romantic features of admiralty come mainly from its salvage decisions. These exhibit many dramatic incidents of heroism and danger throughout the waters of the world. Brevoor v. The Fair American, 1 Pet. Adm. 87, Fed. Cas. No. 1,847, tells how in our old naval war with France, the cook of the captured American merchantman prevailed over the French prize crew and brought back the rescued ship to Baltimore, to participate in a liberal percentage of the hull and cargo. The Holder Borden, 1 Sprague, 144, Fed. Cas. No. 6,600, shows what must have been a frequent experience in the whaling days, the shipwreck near an uninhabited island in the Pacific, the crew saving most of their cargo of oil and bringing it safely to the reef, building a new craft on the island, and finally so navigating to safety and a market for the oil.

The "Amistad" recalls the slave trade. She was picked up off Montauk Point by a government brig and taken into New London. Forty-five African negroes were in possession and two unhappy Spaniards had been doing the work which an effort to sail back to Africa entailed. The forty-five negroes had been kidnapped from their homes for sale in the Cuban market. Somewhere off Cuba they had taken control of the ship, killed the captain and such of the crew as failed to jump overboard, and retained the two Spaniards, apparently their owners, to do the main work of the proposed return voyage to their homes. The Spaniards, pretending to sail towards Africa, had managed to bring up off Long Island, and, doubtless, were greatly relieved when the brig picked them up. The court gave the salvors a third of the ship and cargo, but denied all claims to the negroes as slaves, holding that they were free, and entitled to go forth without delay.

Practice in salvage cases occasionally brings one in contact with some of the very primitive notions of law. One of these is the idea that the finder of wrecked property becomes its owner, or that such property is subject to appropriation by the first occupant. There are probably few shipwrecks which fail to occasion applications of this theory. The neighborhood takes what it can and is usually sincere in the belief that it has the right to do so. The oldest sea codes contain denunciations of the practice, but it was not considered reprehensible in earlier periods of the common law, and perhaps the popular notion is a

survival of an ancient custom of the sea shore. It does not, however, find any countenance with the courts. The Albany, 44 Fed. 431, presents such an instance. She stranded in the Straits of Mackinac with a valuable cargo and jettisoned a considerable quantity, which was appropriated by various parties along the shore with the aid of tugs and lighters. Some of them acted ostensibly as salvors, but on landing the property, they permitted it to be loaded into wagons and carried away by such as chose, to such an extent that the court treated the transaction as one of plunder, and not of salvage, saying:

"The evidence in this case discloses a very singular misapprehension upon the part of a certain class of people with regard to the duties of the public towards the vessels in distress, and with regard to the ownership of property thrown overboard or unladen from them. So far from being moved by the misfortunes of the Albany to extend to her such assistance as was in their power, her signals of distress seem to have been interpreted as an invitation to everybody to help himself to whatever he could lay his hands upon belonging to the cargo. Indeed, there is a medieval flavor about the conduct of the men engaged in this wrecking expedition, which intuitively recalls to the student of maritime law the customs of the Gauls, as stated by Judge Peters in his observations upon the laws of Oleron, who were in the habit of seizing upon the cargoes of vessels stranded upon their coasts, and confiscating them to the use of the lords of the soil, and of either selling their crews into slavery, or sacrificing them as an offering to their gods. Happily the crew of the Albany were preserved from this fate, as she succeeded in extricating herself from the reef, and steaming to a port of safety."

In Murphy v. Dunham, 38 Fed. 503, the question of when the owner of shipwrecked property lost his title was considered. A schooner had sunk in Lake Michigan, loaded with a cargo of coal. Murphy bought it from the underwriters, but did nothing towards recovery, and it lay on the bottom of the lake from May 12, 1883, until after the middle of June, 1884, when Dunham raised nearly a thousand tons and sold it in Chicago. Murphy then sued him for a tortious conversion. The court thought that the suit was rightly brought,—title had remained in the owner, and Dunham was a trespasser in interfering with it. The only way of devesting the owner's title would have been through a judicial sale in a salvage proceeding.

Shipwreck does not devest title. Those who act as salvors will be amply protected by the courts if they observe the requirements of good faith and simple honesty. The basis of the law of salvage is equity and public policy,—equity in adjusting the burden of the loss and the labor of recovery, and public policy in suitably encouraging the protection of life and property from perils of the sea.

E. L. Canfield

Tests of Admiralty Jurisdiction

BY EDWARD W. TUTTLE

of Los Angeles, Cal.

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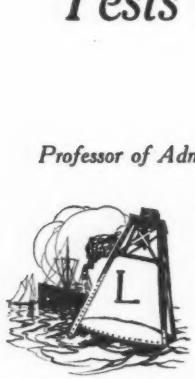


LAW, in general, is essentially a product of the needs of society. The admiralty law, in particular, is the outgrowth of the necessities of maritime commerce. The provision of the Federal Constitution (art. 1, § 2) extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction was a response to the need of uniformity in the principles and administration of the law governing maritime relations.

The differences between the admiralty and common law are fundamental, not only with respect to the procedure and to the remedies available, but in their substantive rules, especially in view of modern legislation.[1] If these differences reflect fundamental differences of social policy with respect to the subject-matter, as presumably they do, then it is a matter of extreme importance not only to the particular litigants, but to society as well, that the limits of the admiralty jurisdiction be determined with due regard to this social policy.

The value and permanence of any body of legal principles depends upon its adaptability to the changing social and industrial necessities upon which it is founded. The authority of Congress to legislate upon maritime matters, as such, is wholly dependent upon the admiralty clause of the Constitution, and its limits are not well defined. It seems, however, that Congress cannot materially enlarge or abridge the admiralty jurisdiction of the Federal courts. "The fact that Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce."[2]

In matters of contract the well-established test of jurisdiction is the maritime nature of the contract, regardless of whether it is made or is to be performed on land. Such a test is in accord with the purpose of the constitutional grant and the social necessities which produced a distinct system of admiralty or maritime law. Its only weakness is an inherent one, due to the difficulty of determining what contracts are maritime. This weakness, however, is a source of strength, in that it gives opportunity for gradual judicial extension of the jurisdiction to meet new conditions.

In the case of torts, however, the test which, in America, has prevailed almost unquestioned until quite recently, has been the somewhat arbitrary one of locality; that is, any tort which is consummate on navigable waters is within the jurisdiction of the admiralty courts.

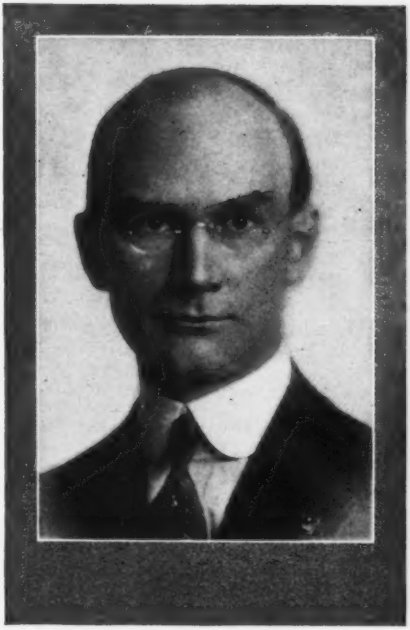
As before remarked, the justification for the existence and continuance of a distinct body of maritime law and a single set of courts to enforce it is the assistance and encouragement thereby afforded to maritime commerce and navigation, and the better protection of those whose rights may be affected thereby. Logically then, we would expect any rule as to what cases should be governed by that body of law and those courts, to be founded upon a recognition of this

[1] See for example the Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891, holding a state workman's compensation act does not affect an employee's cause of action in admiralty.

[2] Mr. Justice Brown in concurring opinion in The Blackheath (United States v. Evans), 195 U. S. 361, 369, 49 L. ed. 236, 238, 25 Sup. Ct. Rep. 46.

fundamental principle. The law, however, is not strictly logical in its development, and there seems to be no very logical reason why locality was adopted as a test of tort jurisdiction. In the case of The Blackheath, Mr. Justice Holmes, in reaching the conclusion that an injury by a ship to a beacon surrounded by water but set upon piles driven into the ground, was cognizable in admiralty, says:

"The precise scope of admiralty jurisdiction is not a matter of obvious principle of very accurate history. . . . There seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. . . . And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation, and no part of the shore, but surrounded on every side by water."



EDWARD W. TUTTLE

The disinclination of the courts to stick strictly to the locality test under all circumstances is further illustrated by a recent case [3] which holds that the fouling and dragging of a telegraph cable lying on the bottom of the ocean and fastened at both ends to the land is a tort within the admiralty jurisdiction.

The locality test, however, is so well established [4] that the admiralty courts deny their jurisdiction over torts happening on land, although they involve a breach of obligations which from any other viewpoint would be regarded as maritime; such, for instance, as injuries to seamen or stevedores, on a wharf while performing strictly maritime services in loading or unloading a vessel.[5] So an injury to one engaged in making repairs on a vessel in dry dock, due to the negligent failure to close a hatchway, is not cognizable in admiralty,[6] notwithstanding that a vessel in dry dock is the subject of admiralty jurisdiction for the enforcement of a claim for salvage services in saving it from fire,[7] or with respect to a contract to repair it.[8] It is not apparent why the obligation of every maritime contract should be enforceable in admiralty in an action *ex contractu*, while the duties or obligations created by such a contract cannot be enforced in an action *ex delicto*, except when their violation occurs on navigable water.

But though the maritime nature of the obligation or relation involved does not alone confer admiralty jurisdiction, *is the non-maritime character of the obligation or relation sufficient to defeat jurisdiction* over a tort happening on navi-

[3] Postal Teleg. Cable Co. v. Ross, 221 Fed. 105.

[4] See Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215; Martin v. West, 222 U. S. 191, 56 L. ed. 191, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; The Poughkeepsie, 162 Fed. 494, affirmed in 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687.

[5] The Mary Stewart, 5 Hughes, 312, 10 Fed. 137; The H. S. Pickands, 42 Fed. 239; The Mary Garrett, 63 Fed. 1009.

[6] The Warfield, 120 Fed. 847.

[7] The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907.

[8] The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8.

gable water? In other words, is the locality of the injury the *sole* test of admiralty jurisdiction, or is it necessary not only that the tort be consummate on navigable water, but also that it be intrinsically maritime?

Having in mind the true basis of the jurisdiction, we might reasonably expect to find admiralty courts refusing to entertain a libel for the breach of a duty in nowise connected with maritime commerce or navigation except through the accidental circumstance that the breach occurred on the water. However this question, though casually noticed by a text-writer,[9] seems never to have been presented for decision until the case of Campbell v. H. Hackfeld & Co.[10] The libellant in this case was a stevedore, and the libellee a corporation engaged in the business of loading and unloading vessels. The libellant was injured while at work for the libellee in the hold of a vessel which he was helping to unload. The libel showed that the injury was due to the negligence of the liebellee, and was not caused by any act or neglect of the owner, officers, or crew of the vessel. An exception to the jurisdiction of the court was sustained both in the district court and the circuit court of appeals of the ninth circuit, on the ground that the tort, though consummate on navigable water, was not maritime in its nature. Judge Ross of the latter court, says:

"The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs. . . . Torts, as well as contracts not maritime, are outside of admiralty cognizance."

The court endeavors to explain the statements in numerous other cases, implying that locality alone is the test of admiralty jurisdiction over torts. One of the strongest of these is from the case of The Plymouth,[11] decided in 1866. Mr. Justice Nelson there says:

"Every specie of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The case of Campbell v. H. Hackfeld & Co. was followed in The St. David, 209 Fed. 985. But the value of these cases as authorities on the non-maritime character of the tort was entirely destroyed by the subsequent case of Atlantic Transport Co. v. Imbrovek,[12] in which the facts were practically identical. The Supreme Court there held that the libellant was injured while engaged in the performance of a maritime service. Mr. Justice Hughes says:

"We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. . . . The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong, in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient. . . . To hold that a case of a tort committed on board of a ship in navigable waters, by one who has undertaken a maritime service, against one engaged in the performance of that service, is not embraced within the constitutional grant and the jurisdictional act, would be to establish a limitation wholly without warrant."

While, from the standpoint of authority, the maritime nature of the tort is immaterial when it is consummate on the land, and, possibly, also when the injury is inflicted on navigable water, it seems hardly likely that the arbitrary test of locality will continue indefinitely in either class of cases, although the only method of changing it appears to be through congressional action.

Edward W. Sutler

[9] Benedict, Adm. 4th ed. § 231.

[10] Campbell v. Hackfield & Co. 62 C. C. A. 274, 125 Fed. 696, decided in 1905.

[11] (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125, decided in 1866.

[12] Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1209, 34 Sup. Ct. Rep. 733, 51 L.R.A.(N.S.) 1157 (see the note appended to this case).

The Remedy for Death at Sea

BY HON. HARRINGTON PUTNAM

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THE maritime law, looked at in its origins, was made by seafaring men. It did not arise from the learning or the speculations of theorists. The guild or company of navigators in the Mediterranean cities not only themselves worked out the rules, which by their adoption were called "Judgments of the Sea," but settled controversies as to their application by arbitrators or judges chosen from among merchants or retired shipmasters. Thus these ordinances or rules dealt in the main with commercial questions, such as arose in the hiring and affreightment of ships. Except the minor matters of assaults upon seamen on shipboard, and collisions with vessels wrongly anchored in the fairways, the old sea laws say little as to maritime torts. Even to-day, the law of personal torts as administered in the admiralty is largely borrowed from the common law, as it has been developed and extended by legislation professing to regulate affairs upon land.

We are familiar with the strange omission of our common-law system to provide a remedy for damages resulting in death. Lord Campbell's act was passed in 1846 to give a recovery for death where none existed before,—a right of action under common-law procedure, including a jury trial. It was so clearly part of the common-law system that in 1884 it was held not to have conferred jurisdiction in admiralty *in rem*. The Vera Cruz, 10 App. Cas. 59. Proceedings *in rem* for death seem still excluded in admiralty in England, though admiralty there recognizes suits *in personam* against the owner. The Bernina, 13 App. Cas. 1.

The dependence of our sea laws on the statutes and systems of land law has been a noticeable hindrance to the growth of the remedial jurisdiction of our maritime courts. In a casualty attended with great mortality by the burning of the Seawahnaka in the Sound entrance to New York in 1880, it was first settled that such death claims came within admiralty jurisdiction. Re Long Island N. S. Pass. & Freight Transp. Co. 5 Fed. 599. Confirmed in 1888 by the Supreme Court in Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

There had been, however, early efforts to hold that the maxim of the common law, that an injury to the person dies with the person, did not extend to admiralty, which might entertain a suit for damages in favor of the dependent survivors. The Sea Gull, Chase, 145, Fed. Cas. No. 12,578; Cutting v. Seabury, 1 Sprague, 522, Fed. Cas. No. 3,521; The Epsilon, 6 Ben. 381, Fed. Cas. No. 4,506. But later the Supreme Court determined that the maritime law as administered in our Federal courts had no such remedy for death, which must therefore be dependent on statutes either of the states or of Congress. The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. This leaves cases arising in local waters to be judged by the statutes of the states, which, as far as possible, are now being administered in the Federal courts by the remedy *in personam*. Of course this breaks up uniformity in dealing with maritime torts causing death. For instance, in admiralty the doctrine of contributory negligence simply meant a corresponding reduction of damages. But when the admiralty court is asked to enforce a remedy wholly derived from a state statute, it does so according to the received scope of that statute. For example, a statute of New York giving a remedy

for death has the condition attached that the deceased shall not by his own want of care have contributed to his death; also a shorter statute of limitations is affixed,—all of which conditions are strictly carried out in the United States courts sitting in admiralty.

The great advantage of proceeding in admiralty is the remedy *in rem*, whereby the vessel when attached, or a stipulation, or bond for its value, becomes a security for the payment of any decree. Most state statutes fail to confer such a right, although the statutes of Virginia and some Pacific Coast states attempt to legislate for a lien. Congress, acting under the grant of power by the Constitution, can give admiralty this jurisdiction both *in personam* and *in rem*, so that the claim for death may have as high security as that of a demand for damage to property.

This dependence on the states for the substantive remedy for death is only a makeshift. It was a declared purpose of the Constitution that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction. The omission of Congress to exercise this power leaves the courts obliged to struggle with state statutes quite divergent in their terms, so that the resulting congeries of modes of remedy on navigable waters show a striking intricacy, leading to marked inefficiency. As long as Congress omits to act, the courts are compelled to resort to the state statutes as sources of liability, and to apply the state laws in the Federal courts. But such statutes are recognized and applied only until Congress makes some regulation touching marine torts resulting in death of the persons injured. Sherlock v. Alling (1876) 93 U. S. 99, 104, 23 L. ed. 819, 820. Thus in McDonald v. Mallory, 77 N. Y. 546, 556, 33 Am. Rep. 664, where the question arose as to a marine tort occasioning death at sea on a vessel owned by citizens of New York, the local statute of New York state was applied on the express ground that "the field of legislation in respect to cases like the present one has not been occupied by the general government, and is therefore open to the states."

This in effect leaves our maritime law as to death at sea to be gathered from the varied legislations of the different states. Among them are provisions imposing liabilities for death without reference to, and having no adaptability to, maritime torts, such as instances of requiring the proceedings to be first instituted by indictment, or other recourse to the criminal law. The constitutional power of Congress to regulate commerce, with the grant to the Federal courts of exclusive admiralty jurisdiction, aimed at a single uniform system for the purpose of avoiding the inevitable difficulties presented by the varying statutes of our different states.

A greater complication arises where casualties resulting in death occur outside state territorial waters. Here the Federal courts, seeking to avoid the reproach of a wrong without a remedy, are driven to resort to the fiction that a vessel is to be deemed a part of the territory of the country to which it belongs. This doctrine, borrowed from international law, is clearly a misfit when applied to the different states of the Union. A steamboat owned by residents of New Jersey does not emerge from Sandy Hook carrying the flag of that state; such a vessel is but a part of the Federal merchant marine enrolled or registered under Federal laws, and is subject to the regulations of Congress and to oversight by the Federal Department of Commerce. But as nature abhors a vacuum, so judicial administration must shun the idea of a community at sea unprotected by law and judicial procedure. To meet this difficulty, the Supreme Court has held that where a collision occurs more than a league from land, a corporation of Delaware proceeding into the admiralty court in a cause of limitation of liability must be held answerable for negligence causing death under the statute of Delaware, the domiciliary state of the incorporated shipowner. The Hamilton (Old Dominion S. S. Co. v. Gilmore), 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133. But this state statute was applied to a collision on the high seas, as an exercise of the legislative power of the state, because it was upon a subject "where Congress has re-

mained silent." This strained application of state statutes to vessels owned by inhabitants of such state is still more difficult in the case of a collision by vessels from two different states with diverse death statutes.

Suppose that a Delaware ship upon the open ocean collides with one from Massachusetts, where the death remedy is quite different, which law is to be applied? In their efforts to do justice, shall the courts be compelled to refine to the point of saying that the statute of the state of the sinking vessel with the drowning lives is the law that governs? Is the wrongdoing vessel, whose blow inflicted the injury, to be judged, not by the law of her state, but by that of the floating piece of territory her impact penetrated? The remedies for such a collision have not yet been thought out.

More difficult and unsatisfactory problems must arise when our commerce is extended through the Panama Canal and reaches toward South America.

Extensive passenger traffic already converges at the Canal Zone. In case of death on the Isthmus of Panama in 1861, the New York court of appeals held that, in the absence of any statute of New Granada, there could be no recovery, although the Panama Railroad Company had a New York charter. Whitford v. Panama R. Co. 23 N. Y. 465.

Later, in 1893, where a fatality occurred less than 2 miles from shore, in the harbor of Savanilla, Colombia, recovery was again denied in an able opinion by Pryor, J., because of the absence of any statute affording such a right of action. Geojhegan v. Atlas S. S. Co. 3 Misc. 224, 22 N. Y. Supp. 749.

Both those injured sufferers presumably sought to found their remedy on a local statute, and discovered nothing applicable. In De Ham v. Mexican Nat. R. Co. — Tex. Civ. App. —, 22 S. W. 249, an action for death of a locomotive engineer in Mexico, the Texas Court of civil appeals held, on a concession of counsel, that Mexican law then (1893) had no remedy for death. Hence it would seem certain that a vessel from Mexico, or one from the United States of Columbia, cannot now be subjected to any such liability in our Federal courts where a fatality occurs on the high seas, or probably within the waters of the Canal Zone. Although the system of compensation to workmen in the Zone, by Executive order, recognized a liability for an employee's death, that does not apply to persons not in the government employ.

Louisiana in 1884 passed a death statute that gave a recovery to the survivors. But their courts, administering the civil law, declare that this act created a remedy before unknown.

> "Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for short-lived pains, and refusing them for a long-life sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life. Legislation has at last come to the relief of future sufferers. The act of 1884 applies the remedy that the public conscience has long demanded, but it has missed application to this case only by a few days." Van Amburg v. Vicksburg, S. & P. R. Co. 37 La. Ann. 650, 651, 55 Am. Rep. 517.

As Louisiana is under the French civil law, this admission that their system had given no remedy for loss of life suggests a like condition in the South American States under the Spanish civil law. Certainly an action for death caused by their vessels, in our Federal courts, would be a futile and lame pursuit, judging by the two cases as to Colombia.

This outline shows the insecurity of human life upon an American vessel, in the courts of the United States. It shows how much greater solicitude is bestowed on rights of property than the rights of persons, and how the loss of human life has been ignored in our legal system.

When questions of reform are raised, it is common to blame courts and lawyers for not responding to popular demands for correctives. Here the courts have not only administered the statutes to protect the dependents suffering from death, but, as we have seen, have strained

the application of state statutes to the utmost, so as to afford some remedy, however inadequate.

More than fourteen years ago, the Maritime Law Association of the United States, a body of practitioners and judges representing both seacoasts and the Great Lakes, took up the question, and outlined a bill to be enacted by Congress to give a remedy for death, to the Federal courts sitting in admiralty. The scope of the measure was simply to grant the same jurisdiction as to a tort causing death as had always been exercised to redress a tort causing injury to property. Yet Congress was strangely unresponsive. The very appearance of such a bill was at first deemed burdensome to shipping and transportation interests. Hearings were had before committees, but little ensued. In the discussions that ensued, the matter of such a remedy for death was taken up and approved by successive votes of the American Bar Association, who appointed a committee to urge the enactment of such a measure.

A practical difficulty is the overlapping of the state and Federal jurisdictions where admiralty courts deal with torts on state waters. There is a dangerous possibility of a double recovery. If the Federal law is made paramount, the representatives in Congress naturally feel that the states are surrendering to Congress control over domestic legislation.

It was the attempt to reconcile these two considerations that has proved a difficulty in congressional hearings. A certain distrust of admiralty courts, because of their diverse system of procedure and absence of juries, also adds to the task of bringing congressmen into agreement towards such a statute operating on inland waters so as to override the statutes of the states.

In view of these many obstacles, the Maritime Law Association, at its meeting on May 7th, resolved to instruct its committee to redraft the bill to limit its application to the admiralty court, instead of giving a remedy, like the Federal employers' liability act, which would be enforced in courts of the state; that this newly enacted remedy for death should apply wholly outside of state waters, being confined to the high seas beyond a marine league from the shores of any state, but also is to be in force on the waters of the Panama Canal Zone, and in the territories and dependencies of the United States.

Such a measure, being distinctly maritime, cannot reasonably encounter objection. The state systems of legislation will stand unaffected. But to supplement such local legislation, Congress will have provided a remedy on the high seas and upon territorial waters like those about Alaska, Hawaii, and the Philippine Islands.

The details of the measure are simple. The personal representatives of the deceased are to be allowed to maintain an action in the district courts of the United States in admiralty for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relatives, for death caused by wrongful act, neglect, or default on the high seas, or any navigable waters of the United States without the territorial jurisdiction of any state, or occurring on the waters of the Panama Canal Zone, or the waters of any territory or dependency of the United States. The act should also provide that contributory negligence of the deceased should not bar recovery, but that the damages shall be diminished by the court in proportion to the amount of negligence attributable to the decedent. This would conform to the provisions of the Federal employers' liability act. Laws 1908, chap. 149.

By the enactment of such a measure, Congress will remedy a grave omission in our legislation. It will put our system on a level with that of the enlightened states of Europe. The duty to safeguard the rights of persons at sea is not less sacred in time of peace than in the exigencies of war; and if this duty be ignored or deferred, some casualty in the neighborhood of the Canal Zone or even in waters nearer home, may be a sad reminder of such neglect.

Harrington Putnam

Shall We Continue to be Drowned at Sea Without Remedy?

BY FREDERIC CUNNINGHAM

of the Boston Bar

SOME of the crude and antiquated doctrines of the common law of England persist, beyond belief, in this progressive and enlightened country of ours, and this is especially so in the law administered in the Federal courts, because Congress is so much engrossed in the discussion and enactment of laws dealing with present novel and politically urgent demands of the people that it has no time for legislation in the nature of law reforms, for correcting defects in the law, which have existed for centuries. In this respect Congress often lags for years behind the legislatures of the states.

For instance, when the horrible catastrophe of the Titanic, sunk by collision with an iceberg in midocean, occurred in April, 1912, with fearful loss of life, the public was amazed to find that, no matter how gross the negligence of her owners may have been, even if the grossest negligence on their part could be proved, the representatives and families of the victims, who were drowned, had no right of action against the ship owners in any of the courts of the United States or of the several states, to recover for their loss, and, what is more, though three years have elapsed since then, and at each session of Congress a bill has been presented to remedy this defect, no law has been enacted. A great wrong of this sort still remains, in this great country, without a remedy.

Now, how has this come about?

Through a technicality of the old common law of England, brought over with us, and never corrected by legislation in Congress.

If these victims had been mangled and maimed, and had lived, they could have sued for their injuries, but the common law gave no remedy, either to a man's estate or to his dependent family, for that greatest of all injuries, his negligent killing. The man's own claim was cut off by his death, under the maxim, *Actio personalis moritur cum persona* (a personal action dies with the person), and it was held that as his own right of action was put an end to by his death, and merged in the felony, his executor or administrator and his next of kin could not bring an action for the benefit of his estate or of themselves.

In most of the states statutes have been passed, making the cause of action for his injuries survive, so that the executor or administrator can recover for the damages suffered by the deceased before death, and in most states, also, in addition, a new cause of action is given to the executor or administrator against the wrongdoer, for the pecuniary loss which the victim's family has sustained by his death.

If the catastrophe had occurred, therefore, within the territorial limits of a state, there would have been a remedy, but these state statutes have no force upon the high seas, out of the limits of the state, and as Congress, which alone has authority to pass laws governing injuries on American vessels on the high seas, has not acted and given a remedy by statute, no remedy exists.

This defect in the common law was remedied in England as early as 1846 by the fatal accidents act, commonly known as Lord Campbell's act, upon which most of our state statutes on this subject are founded.

For the past fifteen years at least, long before the Titanic disaster, in fact ever

since the loss of La Bourgogne off Sable Island, in July, 1898, this subject has been agitated, and in March, 1900, a bill was introduced into Congress by Mr. Boutell, of Illinois, providing a remedy in the Federal courts for death by negligence on the high seas and Great Lakes, and more recently bills for this purpose have been introduced into Congress, and supported by committees of the American Bar Association and the Maritime Law Association of the United States, as yet without result, though their bill passed the House of Representatives at its last session, but failed to pass in the Senate.

The failure of these bills to pass was due largely to the fact that they tried to do too much. The bill in the last Congress, as originally drawn, excluded trials by jury at common law, where the common law was competent to give a remedy, made the jurisdiction in admiralty exclusive, and so interfered with the jurisdiction of the state courts, and, in the form in which it finally passed the House, tried to make a change in our laws limiting the liability of shipowners. I thoroughly believe that if a simple bill making the right of action for injuries received by the deceased before his death survive in favor of his executor or administrator, and providing, in addition, for damages in such action for his dependent family, to compensate them for their loss, had been presented, it would have passed Congress, and would now be a law under which the executors and administrators of the passengers lost on the Lusitania could hold the Cunard Company liable for their negligent navigation, if that can be proved. As it is, they are in the same helpless condition, without legal redress, as were those lost on the Titanic.

I append in a note [1] a bill which I believe would be all sufficient, and that Congress would pass. It interferes neither with a trial by jury at common law in the proper cases, nor with the jurisdiction of state courts, nor with the statutes limiting the liability of shipowners, and includes in its provisions actions on the common-law side of the Federal courts, as well as actions in admiralty; it merely adds to our law what is now lacking, owing to the survival of the old common-law doctrines, which are certainly now antiquated, and takes no rights away from any persons or any courts.

Disasters like the Titanic and the Lusitania show the crying need of such a law.

Forden D Cunningham

[1] A bill to provide for the survival and bringing of actions for injuries on the high seas and elsewhere, resulting in loss of life and for other purposes.

Section 1. Actions of tort or damage for injuries causing death shall survive, and may be brought or prosecuted in the courts of the United States by and in the name of the personal representatives of the deceased, for the benefit of the husband or wife, heirs, or next of kin of the deceased, whether the death was instantaneous or not, and whether it occurred on the high seas or elsewhere, and although the death shall have been caused under circumstances amounting to a felony; and such actions may be *in rem* or *in personam* in the admiralty wherever the deceased, if death had not ensued, could have brought such an action in admiralty.

Section 2. The damages in such actions shall include compensation for the pecuniary injuries resulting from the death of the deceased to the person or persons for whose benefit the action is brought; but the recovery in respect of the death of any one person shall not exceed $5,000; and the action shall be begun within two years after the occurrence of the death in respect of which damages are sought, and not afterwards, provided that reasonable opportunity to secure jurisdiction has offered within that time.

An Attempt by Lawyers to Remedy the Law

BY HON. FITZ-HENRY SMITH, Jr.
of the Boston Bar

UDGE PUTNAM'S and Mr. Cunningham's papers are very timely. Following the passage of Lord Campbell's act in 1846, the various states of the American Union have remedied their common law by similar enactments, and Congress has provided for the District of Columbia, so that to-day probably everywhere in this country there is a civil right of action for death due to a negligent act. But notwithstanding this evident preponderance of public opinion in favor of a recovery for death, the maritime law of the United States has been left unchanged, and no recovery for death can be had under that law. To quote the language of the Supreme Court: "The rights of persons in this particular under the maritime law of this country are not different from those under the common law." (The Harrisburg, 119 U. S. 199, 213, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140.)

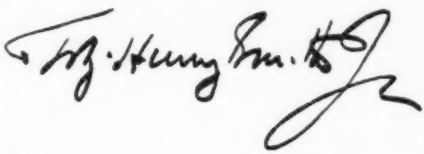
In the case of domestic vessels, the Federal courts have resorted to the makeshift of applying the local state statutes so far as they are able to do so, but the practice has its difficulties and limitations as Judge Putnam has pointed out. This is especially true in respect of accidents on the high seas where a foreign vessel is involved. For example, what law is to govern a collision on the high seas between a British tramp steamer and a vessel hailing from (say) New York, resulting in the death of American citizens on the American vessel through the fault of the steamer? If it be the law of England, no suit can be maintained in this country if no one representing the owners can be found here. For even if the steamer comes into an American port for repairs, under the English law the vessel cannot be sued for death. (The Vera Cruz, L. R. 10 App. Cas. 59, 54 L. J. Prob. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324.)

Further, the state statutes have no real place on the high seas. In the case of La Bourgogne (210 U. S. 95, 138, 52 L. ed. 973, 993, 28 Sup. Ct. Rep. 664) Mr. Justice White laid down the principle "that where the law of the state to which a vessel belonged—*in other words, the law of the domicil or flag*—gives a right of action for wrongful death on the high seas on board of the vessel," the right will be recognized in a court of admiralty of the United States in a proceeding to limit liability. La Bourgogne flew the French flag, and the court applied the law of France in the absence of any law of the forum upon the subject. But no American vessel flies a state flag. In fact, the states, as such, have no vessels. All American vessels are vessels of the United States, documented under and subject to the navigation laws of the United States, and it is an anomaly that one such vessel may be said to carry with her upon the high seas one law and another vessel a different law, though both fly the American flag.

What is needed in this country is a Federal statute providing a "law of the flag" for American vessels upon the high seas and a "law of the forum" for the Federal courts, applicable to all vessels when brought before our courts. For the past fourteen years a campaign has been waged to induce Congress to pass such a measure, as Judge Putnam has stated. Initiated by the Maritime Law Association of the United States, the movement has, in the last few years, re-

ceived the backing of the American Bar Association, but as yet without success. Lawyers are accused by laymen of paying too much attention to precedents and of making too little endeavor to secure a just result; but here is a situation where two bodies of lawyers have gone before the representatives of the people with a measure aimed to remedy the law in the interest of justice, and to protect Americans, only to meet with discouragement.

Mr. Cunningham thinks that the bill submitted attempted to do too much. If so, it resulted from a desire to protect all interests; and the provision making the admiralty jurisdiction exclusive over the high seas was for the purpose of uniformity. Certain it is, however, that the subject of limitation of liability (introduced by amendment on the floor of the House) does not properly belong with a measure relating to recovery for death. The limited liability acts of the United States are separate statutes affecting loss of property as well as loss of life, and should be treated separately. With such subjects as workmen's compensation, so much in the minds of legislators, I think it may be said that the failure of the bill of the bar associations was due to a miscomprehension of its real scope and purpose. The measure simply aims to provide a remedy for injuries resulting in death in maritime cases where a remedy now exists for injuries that are not fatal, and to bring the maritime law of the United States into accord with the law of the several states. It would seem that no one could object to an act upon the subject, such as outlined by Judge Putnam. And it is hoped that all members of the legal profession, whether admiralty practitioners or not, may take an interest in the measure to the end that when bench and bar ask for a just change in the law, it shall not be denied them.



Guiding Principles

Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, —entangling alliances with none; the support of the state governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; . . . freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected,—these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.—From First Inaugural Address of President Jefferson.

The Law of Admiralty

BY EDWARD H. BLAKE, LL. D.

THE law of admiralty, as is well known, concerns itself with a ship, and the reciprocal liabilities and obligations *ex contractu* and *ex delicto* that arises from the activities of the ship upon interstate and international waters navigable in a commercial sense. The first navigator, Captain Noah, acted without the license of a constituted board, without lifeboats, charts, or the marine furniture required to-day by law; yet he made port with more or less success. It is interesting to contemplate what our condition would be to-day, provided the records in the then marine Lloyds had been: "Sailed—the Ark—Noah, Captain—not heard from." The special legislation regarding equipment that has grown out of the Titanic disaster evidences the progress from that day to this.

The dignity of the admiralty rises to that of international law. It is a branch of the law of nations. Its sanction in this country is the United States Constitution.

"If we impinge never so lightly on the life of a fellow mortal, the touch of our personality, like the ripple of a stone cast into a pond, widens and widens in unending circles through the æons till the far-off gods themselves cannot tell when action ceases."

This truth may be said of the ancient impulse of the principles of the admiralty law upon the commercial relations of mankind since nation dealt with nation.

The admiralty law is the common law of the sea, based upon reason and expanded by precedent. It is called the general maritime law, is administered by the courts of nations, and, as modified by environment, becomes the maritime law of the particular nation which adopts it.

Our own Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction."

The judiciary act in extending this phrase in the Constitution provides that the Federal district court shall have exclusive jurisdiction of all cases of admiralty and maritime jurisdiction,—saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. This common-law remedy has been construed to be the right of a plaintiff to proceed *in personam* against a defendant,—a remedy the common law *is* competent to give. While the jurisdiction of the admiralty is thus concurrent with that of the common law, there are certain distinctions, of a practical nature, in actual practice, which may be of interest.

Let us touch, then, upon some considerations which should influence the practitioner in his choice of forum in a case triable either in the admiralty court or court of common law.

The common-law doctrine of contributory negligence does not obtain in the admiralty. Let us assume a case of collision and resulting damage between vessels in Massachusetts Bay.

At common law, if the defendant could prove contributory negligence on the part of the plaintiff, such proof would defeat recovery. In the admiralty, contributory negligence is not a bar to recovery, but a factor in the adjustment of damages.

The theory of the admiralty is that, in the stress of circumstances that usually accompanies a collision at sea, an act of negligence is apt to be done *in extremis,* and the degrees of negligence are of such refinement as not to be susceptible of precise determination. Therefore, the admiralty endeavors to make an equal adjustment of the burden of damage.

A common-law court could entertain an action of tort against the shipowners, but could not give the peculiar remedy of

a division of damages, which the admiralty alone may give.

Again, in a case of salvage, a common-law court has jurisdiction of a suit for salvage on express contract, and sometimes on contract implied, but the salvage award will follow the usual rule of practical compensation for the work and service rendered. The award cannot take into consideration the personal equation of self-sacrifice, of the peril involved, and of the bravery adequate for its overcoming. This the admiralty court may do.

Again, the peculiar remedy afforded by the limited liability law where there is a multiplicity of claims, and the proceeding is both *in personam* and *in rem*, the common law is wholly incompetent to give.

Moreover, the simplicity of procedure is in favor of the admiralty. The court is judge of both the law and the fact. The court is always in session, thus avoiding the delay attendant upon the regular terms of the state courts. Amendments are generously allowed; the discretion of the court being directed toward a prompt settlement of the controversy, so as to interfere the least with the commercial activities of the ship.

The elimination of the jury seems to be an anomaly in the administration of justice as represented by the genius of the Anglo-Saxon race. A word of explanation may be of interest. As stated in Benedict, "Depriving us in many instances of the benefit of trial by jury" was one of the grievances enumerated in the Declaration of Independence, and the trial by jury has always, to the American people, been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to it is secured by all the state Constitutions, and the want of such an express security in the Constitution of the United States was one of the strongest objections taken against its adoption.

To meet the public feeling on this subject, the 6th and 7th Amendments to that instrument were adopted, the 6th Amendment providing that in all criminal prosecutions the accused should enjoy the right to a speedy and impartial trial by jury of the state or district where the crime should have been committed; and the 7th Amendment preserving the right of trial by jury in actions at common law where the value in controversy exceeds $20. Neither of these provisions applied to admiralty cases.

The judiciary act passed immediately after the adoption of the Constitution, in its provisions for the organization of the district courts provided that "the trial of issues of fact in the district court in all cases *except* civil cases of admiralty and maritime jurisdiction shall be by jury."

Therefore, when the people had the subject before them, fresh from discussion in relation to the Constitution itself, they confined the necessity for jury trials to crimes committed within the territorial limits of the United States, and to a limited action at common law, but left the jurisdiction of transactions so peculiar as those of the sea to be exercised only by judges schooled in the principles and mystery of such transactions, as has been done in all ages and nations before, and refused to leave them to the uncertainties of juries familiar only with the customs and necessities of the land. Congress wisely gave to the trial of maritime offenses a jury, but as wisely decided that in causes civil and maritime, the court should decide the facts as well as the law.

The student of the admiralty law finds himself at the same time a student of the Constitution. Its enlargement by judicial construction over the limitations imposed by English and Continental law is a conspicuous example of the wisdom of those great Federal judges whose interpretation of the Constitution was of a constructive character.

The student of the applied construction of law may find an inexhaustible wealth in the admiralty decisions of the Federal courts.

Edward H. Blake

The Contest Between the Moral and Jural Law

BY THOMAS W. SHELTON

of the Norfolk (Va.) Bar

[Ed. Note—We are indebted to the courtesy of Mr. Shelton and of the Mississippi State Bar Association for permission to publish this extract from the annual address delivered before that body by Mr. Shelton on May 25, 1915. The remainder of the address, suggesting a new system of procedure, will be presented in a following issue of the Magazine.]

IT IS not intended in what is to follow to tell anything new; to be guilty of the temerity of attempting to teach law, nor even to outline a program. It is proposed to present in simple language some commonplace facts and observations, and to leave to the trained and mature minds of lawyers, and a just sense of professional obligation, the proper course to pursue. We shall proceed upon the assumption that it is more desirable that the constructive minds of the bench and bar should be put upon causes, rather than upon results.

Causes, Not Abuses, Are The Paramount Issues.

We shall not, therefore, dwell so much upon particular abuses as upon the things that make them possible. The belief is ventured, and it is further laid down as a premise, that the tendencies of human nature to-day are not materially distinguishable from those of the peoples who took their rules of conduct from Hammurabi, Moses, Lycurgus, Solon, Justinian, and Napoleon,—the great historical and mythical lawgivers of the world. If any difference there be, it but reflects the evil influences of governmental machinery permitted to become obsolete. Men, overwhelmed by badly administered law, are like men overwhelmed by a flood,—they strike out blindly and catch at straws. In such a cataclysm, strong, organized relief is essential, which is the pivotal thought of the observation to be made. Certain it is that we of this generation lay much store by the principles they propounded, that have outlived crusades, the decadence of peoples and of nations, and have come to us shining imperishably like bright jewels in the ash heaps of the ages. Modernity, therefore, will do well to search diligently for and studiously avoid the causes that led to the destruction of the governmental systems for which these great lawmakers were responsible. It is well, also, to be mindful that this splendid Republic was created for an original people, a race of pioneers, whose form was copied from no predecessor.

Administration Must Be Modernized.

This government will live and be strong just so long as the principles conceived by its makers, and particularly its three subdivisions of power, are observed; and just so long as a necessary response to the demands of inevitable evolution continues, to prevent man from becoming greater than the law; the while, keeping the law in proper subjugation to individual human rights and improving the machinery thereof, so that it always may be modern, practical, sensible, and suitable to the prompt, economical, and direct vindication of these rights. These things are conditions subsequent, and are true whether the act of the government be one of protection or of deprivation of natural rights in the interest of society. The corollary to that proposition is, that we must do more than

simply enjoy an inheritance that someone else created for us, but strive to modernize and to improve it. The legacy of law and principle left by our forefathers are so many talents, which we may not wrap in a napkin. Neither may we convert them into a fetish. Thomas Jefferson explained his opposition to certain proposals by predicting that "our children will prove as wise as we are, and will establish in the fullness of time those things not yet ripe for establishment." The question for us to answer is, Have we, nearly a century and a half afterwards, kept the faith, particularly with reference to the judicial department of government, by living up to Jefferson's expectations? Are we conservatively progressing or subserviently retrogressing? Nature abhors a vacuum, and makes corruption of stagnation. In the history of nations there ever has been evolution or revolution.

It was a woman (Madame de Stael) who declared, "That past which is so presumptuously brought forward as a precedent for the present, is itself founded on an alteration of some past that went before it. . . . We are the ancients of the earth and in the morning of the times."

The Relation of the Lawyer to Government.

These simple truths seem to underlie and to justify the progressive campaign of the American Bar Association in its conservative efforts to set free the judicial department from the legislative; to modernize the courts; to segregate purely commercial litigation; and to bring laymen to a better understanding of and a more sympathetic relation with the judges and the lawyers. Its importance cannot well be overestimated. It is profoundly believed that the relation existing between the layman and the lawyer measures the strength of the government and defines its genius. From the beginning of the social compact, there is no human endeavor of consequence without the association of the lawyer. The great Jewish doctor of laws, Gamaliel, figured in the life and conduct of the Apostles, and saved them by giving to his people conservative, practical advice concerning their public policy. (Acts 5:34.) In the first days of the Israelites, we are told that God sent judges to deliver the people; that they administered justice, and their authority even supplied the want of a regular government.

A Strong Bar Means A Strong People.

A popular condemnation of judges and lawyers in the past has been a certain symptom of governmental weakness and deterioration. A strong bar, which is the concomitant of a great bench, has ever been symbolic of a strong, prosperous, and contented people. Indeed, of the three divisions of government, the judicial department, of which the lawyer forms a most important part, is the corner stone as it is the guidepost that keeps straying feet in the straight and narrow constitutional path; gives confidence to commercial enterprise; stays the threatening hand of oppression, and gives assurance unto the weak. I venture to assert that the executive and the legislative departments might cease their operations for a given time, with no other result than inconvenience; but the suspension of the functions of the courts for one day would mean anarchy,—when might, and not right, would become the measure of civil liberty and of property rights. How important it is, then, that in the practical application of the jural law the people should respect the bench and the bar; aye, should reverence them and look to them as the preservers of their sacred rights; and what a noble obligation rests upon the judge and the lawyer to measure up to this high calling, particularly by impressing his personality and wisdom upon the framing and operation of the judicial department of the government!

An Illustration.

Let an illustration made some years ago be repeated. The judicial department is to the law what the aqueduct and the water pipes are to the great reservoir where the water is gathered and stored. The quality, quantity, and usefulness of the water, however pure in its origin, depends absolutely upon the system through which it is conveyed to the city and distributed. If that be broken and leaky

and inadequate, the supply actually received by the people will be uncertain, slow, and insufficient, and all commercial and social efforts must suffer accordingly. If the system be foul, so will the water be contaminated and spoiled for the merciful use for which it was intended, and become the very antithesis of an agency next to godliness. So, though the legislative department be everything that could be required of it, and the statute books were filled with the wisdom of a Solomon, the usefulness thereof will be limited and measured by the courts and the lawyers, by whom solely it is administered.

Three Pregnant Thoughts.

This illustration will not fail forcibly to bring to your minds three pregnant thoughts. The first is that the enactment of conflicting and uncertain statutes, or the overloading of the books with a plethora of unnecessary laws concerning intimate personal relations, means that courts must be multiplied, burdened, and delayed. The second is that both the lawyers and the judges will be overwhelmed with a great mass of undigested mental diffusions parading in the sacred vestments of judicial decisions or dignified statutes. The third thought is that, turn as one will, the lawyer and the judge, and not the opportunist or self-centered legislator, are the direct victims, and for that reason if for no other and higher one, are selfishly interested in the Legislators' attitude towards the judicial department. Let it be emphasized that upon them must rest the sole responsibility for the scientific evolution of the law. The legislative department must therefore set them free that this duty may be performed. One does not call for a president or a director in the cab, but a trained, practical machinst who understands the detail working of the locomotive and the route to be traveled. The proverbial patience or subserviency, as you please, of the lawyer, has ceased to be a virtue, but has become a menace to his own safety and standing and that which he holds most sacred. Would not co-operation and coordination between the legislative and judicial departments, as was intended by the founders of the government and the scheme of the Constitution, prove highly beneficial? Can the continued usurpation by the legislative department of the functions of the judicial department sustain a government against the very genius of which it shows hostility?

The Lawyer's Duty and Course.

It is a sense of this dual personal and professional responsibility resting upon the lawyer at this particular era in the evolution of our governmental life, that it is desired to awaken into constructive militancy. No observant man will longer dispute that this country is on the threshold of an era-making juridical reformation similar to that of England in 1873. The lawyers have almost unanimously accepted the new program, and if they now embrace the opportunity to demand its adoption, it is devoutly believed that they will have performed a greater public duty than had they laid down their lives in battle! Nor is it necessary that this be done in legislative halls, for the organized voices of upright men earnestly contending for a righteous cause can and ever will be heard. It is a profound duty that this campaign be kept out of politics, but a profounder duty to see to it that it succeeds. If the final and permanent fruits of liberty are wisdom, moderation, and mercy, the defenders of liberty should be wise, moderate, and merciful men. My object, then, is to persuade you to catch the infectious enthusiasm of the American Bar Association in its determination that no twentieth century Milton scoffing at a miserable subserviency to legislative usurpation, shall write *their* biography in satire and sport, but that the lawyers of this day and time shall leave behind them an undisputable legacy of having fulfilled the complete mission of their high calling.

The Human Equation.

We have been discussing the law and its makers and its administration, but let us go deeper, and consider the human nature and the spirit of the man for the regulation of whose conduct the laws are made, for there interesting causes of dissatisfaction will be found. It will appear that the representatives of the peo-

ple, many of whom are lawyers, have been giving ear to the boisterous brooks that soon lose themselves in the river, and have paid little attention to the deep, serene, and irresistible power of the great, philosophic stream of humanity. As has been indicated, neither our government nor our people find their prototype in modernity or in antiquity. We must legislate for an original people, from whom, may Heaven be praised! a deep-seated, unselfish, patriotic spirit in the social and national life has not entirely departed, and ought to be encouraged.

The Pioneer Spirit.

Some time ago it was my privilege to attend the "Sportmen's Show" in New York. One man, of the many little groups that filled the "Grand Central Palace," drew my attention, not alone on account of his prowess with his rifle and rod, nor his adventures and temporary abode in the boundless stretches of the far Northwest. It was the reason that drew him away from the ordinary routine of the much-vaunted organized society of the twentieth century, in which every thoughtful man must be interested. Standing well up in his boots, his big frame spoke forcefully of physical health, and his clean eyes, looking straight out from an intellectual face, interpreted eloquently a clear brain and a wholesome, cheerful nature within. He was an unspoiled, natural man.

An Innate Resentment of Artificial Conduct.

The sportsman gave his reason in one sentence. This intelligent and intellectual man, resenting the multiplied and conflicting rules of conduct as translated in the form of statutes and reported cases and the crippling of character by the inroads of paternalism in government, was drawn into the unsurveyed wastes of the mountain fastnesses *in search of a country where a man could still make his own law.* The spirit that was within him yearned for a land where he could turn his face to the Maker to whom he acknowledged responsibility and final sovereignty, unrestricted by the artifices and egoism of man.

"Nature is mighty. Art is mighty. Artifice is weak. Nature in the work is the work of a mightier power than man. Art is the work of man under the guidance and inspiration of a mightier power. Artifice is the work of man alone in the imbecility of his mimic understanding."

Character Is the Moral Law in Supremacy.

With complete satisfaction, one would select him out of the complex social fabric as being sufficiently far above the average citizen as to wish to know his outlook upon society as it is organized; his ideas of political science; indeed, his philosophy of life itself as these factors enter into, make up, and measure the participation of man in the affairs of the brief span allotted to him. And we shall presently see that his views were but observations of the practical contest that is now going on, and that ever has gone on, between the moral and the jural law,—between the innate sense of justice voluntarily done, and the artificial standards of conduct enforced by organized government. Obviously, wherever groups of men have their homes in the world there must be some restraint, for law is inherent in society. The merit of such government is reflected in the general rules of conduct by which rights and duties may be determined and organized. That phenomenon is the course of the jural law subjugating and taking the place of the moral law; and the respective proportion of the two is the measure of personal character and citizenship.

A Standard for Legislation — The Pioneer Spirit.

Taking this sportsman as a fair example of citizenship, does not that cry typify the normal man that laws are made to govern? Is it not of the first importance to permanent civilization that organized society should aspire to such a standard? Is it not a true reflection of the real human spirit that it is desired to regulate, and, in its analysis, becomes intercourse between the creature and his Creator? Is it not the spirit that should pervade the body of the law and the policy of the government? That being

so, is it well to depart far from its simplicity and wholesomeness in the erection of artificial rules of conduct—the substitutes, considered by Congress and the legislatures to be necessary, for the moral law? And while we shall presently see some practical governmental evils following its violation, the ravages upon the ideal citizenship may be fairly well deduced.

Paternalism Is not Keeping the Faith with Pioneerism.

A policy of paternalism in government and statutory morals is not keeping the faith with the pioneer spirit. We boast of a progressive country, but when men are taught to lean upon the government, instead of supporting it, the nation is not progressing, but it is retrogressing. A nation is no stronger, purer, or better than its people. Governmental improvement is simply a corollary to individual improvement. That is the reason for popular campaigns of education. It was a sense of personal responsibility and individual independence that conceived governmental independence and won it in America, and it is that spirit, alone, that will preserve it. This country needs fewer new laws and more real men; it needs less jural regulation and more moral sensibility; it needs less public training and more domesticity; it needs fewer codes and more Decalogues. It is certain death to manhood and good citizenship to lead men away from personal responsibility and self-reliance into the delusion of artificial standards.

"In vain we call old notions fudge,
And bind our consciences to our dealing;
The Ten Commandments will not budge,
And stealing will continue stealing."

There Is a Universal Moral Law.

But let us continue in the train of our Sportsman's observations, for they bubble forth from the crystal spring of the unconquerable human soul. Of him it may be said that, "Well roars the storm to those that hear a deeper voice across the storm," and Marcus Aurelius epitomized his personal philosophy in: "This being of mine, whatever it really is, consists of a little flesh, a little breath, and the part which governs," that part which, though living with the finite, reaches out everlastingly after the Infinite in all tongues and in all conditions of human beings. I wish to believe that this inclination in the red Indian, the black Hottentot, and the pale Caucasian, is an involuntary effort at a response to a universal law, a system of rules contemporaneous with the creation of man and the world which he inhabits; that "Infinitude silently walks amongst men like beauty invisible in the landscape," and that the designation of this as a Christian nation is but a judicial recognition and an attempted application of this great principle.

An Analogy in the Natural Law.

We are willing to take our natural philosophy from the scientists, and to believe that the whole scheme of creation is controlled by principles and a system of rules, fixed and unchangeable, and often too simple to attract the attention of the wise and prudent whilst they are revealed unto babes. How many of us, as we stand and gaze into the starry expanse of night, admiring its grandeur and its beauty, reflect upon the perfect system of rules and laws that keep the trillions of stars and the planets in their charted courses, and send the earth whirling in its orbit about the sun in a schedule so simple that man may measure dimensions and speed and fix their stations at any moment in the past, the present, or future! It requires no trespass upon individual religious dogma to believe that this systematic and orderly operation of rapidly moving masses in limitless space is not accidental, nor the outcome of expediency or of experiment. It is a fixed and a designed program, the performance of which is the result of inexorable natural law and of profound principle.

Results of Breaches of Either Law Unknown.

One need not speculate upon the direful result of the violation of the simplest one of these natural laws, save as it may serve to illustrate and to give reason for the application of like rules to man and the moral law that regulates his existence. And no more does one know the present nor the final penalty, nor the

present nor the final result, of breaches of the moral law. Without caring what view others may take, or acknowledging that our premises require a solution of the world-old problem, as for me, I do not believe that the presence of man on earth is any more of an accident than the organized solar system, or that the jural law could forsake that principle and live. An analogous condition would be the regulation of his relation and conduct by certain fixed principles and rules equally as inexorable.

The Search for a Common Source of Justice.

Is there not, then, both analogy and reason for the belief that there is a common source of justice, though it may never be found and understood by man, from which all jural law should draw its spirit and power? Lord Chesterfield said to his son, "Let us aim at perfection in everything, though in most things it is unattainable. However, they who aim at it and persevere will come much nearer to it than those whose laziness and despondency make them give it up as unattainable."

> "Success is not reached in a single bound;
> But we build our ladder by which we rise
> From the lowly earth to the vaulted skies,
> And we mount to the summit, round by round."

The Moral Law Is not Properly Emphasized.

If as much popular attention and recognition were given to the philosophy of the moral law as is given to the science of the natural law, there would be less need for arbitrary jural laws and experimental courts in which to enforce them. The public would cease running to a paternal government for a cure for every social ill. There would be more unspoiled natural men and women, and fewer "isms" and "uplifts." They would find the cause of the malady largely in themselves and a lack of spiritual and mental discipline, and would eradicate the cause, instead of complaining of results. The average school child knows more about natural philosophy than the average man knows about moral philosophy. It would greatly aid the Constitution to interpolate St. Luke, 10:27. And let me diverge a moment to emphasize that, as the astronomer is the exponent of the natural law, so the lawyer must be the exponent of both the moral and the jural law. His client will seldom rise above him; he will often sink to his level.

Macauley's English Example.

There is no better example of this than the achievements of the English people and the English bar. Her most honored men to-day are her lawyers. How difficult it is to look upon that enlightened, cultivated, and powerful nation whose influence for good is felt around the world, and find justification for Milton's satire or believe Macauley's description of the people immediately following Cromwell's protectorate. Said he:

"Without casting one glance on the past, or requiring one stipulation for the future, they threw down their freedom at the feet of the most frivolous and heartless of tyrants. Then came those days, never to be recalled without a blush, the days of servitude without loyalty and sensuality without love; of dwarfish talents and gigantic vices; the paradise of cold hearts and narrow minds; the golden age of the coward, the bigot and the slave. . . . The government had just ability enough to deceive, and just religion enough to persecute. The principles of liberty were the scoff of every grinning courtier and the anathema maranatha of every fawning dean. . . . Crime succeeded to crime and disgrace to disgrace, till the race, accursed of God and man, was a second time driven forth to wander on the face of the earth and to be a by-word and a shaking of the head to the nations."

Some Obvious Deductions and an Illustration.

Now, what obvious deductions may we draw from these thoughts? It is the failure to observe the moral law that brings the jural law into existence; the rapid legislative substitution of policy for principles; and the iniquitous doctrine of all things being right not forbidden by statute. It is the presence of these jural laws that is crowding the dockets of the

courts. It is a failure to keep these laws that is demanding additional courts and commissions without end. The phlethora of statutes and remedial commissions may be likened to the effort, with many small vessels, to catch the water from a broken pipe instead of stopping the leak. That means that the road is one without turning and without end. Where we shall drop out of the procession one does not like to speculate, unless there comes a recrudescence of the pioneer spirit, and a livelier awakening of the individual conscience to a sense of personal and public responsibility and duty.

Domestic Courts Are Danger Signals, Not Remedies.

Let me ask you, what is the message carried to your trained and philosophic minds by the conceded necessity for "domestic" and "juvenile" courts? Has an end been achieved by establishing these extraordinary forums? Far from it, indeed! They are merely results,—danger signals, pointing to a diseased social status, — not remedies. Have you searched your minds to find the causes that seem to justify them, and have you read the answer, that this is one instance where the jural law cannot be substituted for the moral law? If we continue dealing with results and ignore the causes, obviously, the results will be multiplied until the very moral status of the nation is weakened. It is taken quite as a matter of fact that Nevada is to-day capitalizing and legalizing one of the chiefest vices of the nation. This is a preventative age in everything except social relations. We need a little less governmental, "Thou shalt not," and a little more personal, "I will not."

Applying the Test of Facts.

What practical good has been or is being accomplished by this generous substitution of the artifice of man? The sentimentalists, always busy with their sieve-like buckets, spectacularly and heroically trying to carry away the water from the leaking pipe instead of applying the practical remedy of stopping the leak, boast of a recession in crime. What are the facts? In Germany in 1907 there were 567 homicides; in England 318; in France 847, and in statute-ridden America, 6,597. These figures are authentic, and the year 1913 shows a worse comparison.

Justice

Each citizen wants to live as fully as his surroundings permit. This being the desire of all, it results that all, exercising joint control are interested in seeing that while each does not suffer from breach of the relations between acts and ends in his own person, he shall not break those relations in the persons of others. The incorporated mass of citizens has to maintain the condition under which each may gain the fullest life compatible with the fullest lives of fellow citizens. To maintain intact the conditions under which life may be carried on is a business fundamentally distinct from the business of interfering with the carrying on of the life itself, either by helping the individual or directing him or restraining him.—Herbert Spencer.

Philosophic Essays On Law

Seventh Essay: The Science of Jurisprudence

BY WILLIAM W. BREWTON

Of the Fort Valley (Ga.) Bar

PART TWO

"To the constrained, nonspiritual, and unfeeling intelligence of the Roman world we owe the origin and the development of *positive law*. . . . Even among the Greeks, morality was at the same time juristic right, and on that very account the constitution was entirely dependent on morals and disposition, and had not yet a fixity of principle within it, to counterbalance the mutability of men's inner life and individual subjectivity. The Romans then completed this important separation, and discovered a principle of right, which is external—*i. e.*, one not dependent on disposition and sentiment. While they have bestowed upon us a valuable gift, in point of *form*, we can use and enjoy it without becoming victims to that sterile Understanding—without regarding it as the *ne plus ultra* of Wisdom and Reason."—Hegel.

"Hence it is evident that in seeking for justice, men seek for the mean or neutral, and the law is the mean. Again, customary laws have more weight, and relate to more important matters, than written laws, and a man may be a safer ruler than the written law, but not safer than the customary law." —Aristotle.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule [rule of last authority taking precedence over a prior authority] as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."—Alexander Hamilton.

PROGRESS in legal science, as we have had occasion to indicate, consists of supplementing and altering the Law where experience has exhibited legal error. The satisfaction of legitimate demands upon the Law, those demands which come from a source to which legal justice may be remanded, is its problem as man's means of right. The increasing complexity of civilization inevitably increases the number of these demands. And if it be that legislation does not keep pace with juristic demands, it falls to the lot of adjudication to supply the defect. Adjudication arises after the demands are asserted, and can therefore remedy in accordance with their observed and investigated nature. Legislation must ever be heir to those errors which are due to defective anticipation; that is to say, created laws arise before many of the demands to which they will be applied arise, and can offer effective remedy to those demands only in so far as they have been able to anticipate the demands. Inasmuch as laws cannot anticipate the entirety of future needs arising under them, the adjudicator will ever have a place in legal science. The influence of adjudication on the Law, therefore, will always be present, thus becoming responsible for much of the content of the Law.

The more or less permanent and fundamental principles of right, applicable under legal science, are represented by substantive law. Permanent laws have their validity established by general experience, by recurring cases to which they satisfactorily apply, and which therefore sanction them. Yet, while positive law, whether it has arisen because of common-law or statutory origin, may be altered, and thus remedied, by amendatory legislation, it will nevertheless always be subject to judicial influence, for in applying laws, courts are being constantly presented with conditions to

which if reason is followed, the laws must be applied in a way which has previously never received consideration; that is to say, the laws (which have not always anticipated the causes to which they apply) must ever be attended by judicial discretion when they are applied, and are therefore subject to modification.

Thus it has been inevitable that there should arise what to-day is termed "case law." Consuetudinary demands are constantly requiring more suitable and convenient legal applications than are indicated in many of the laws themselves; and judicial influence is constantly changing the Law. For many modern statutes, even, are the direct result of standards of legal policy and right set up by courts through repeated decisions, which, being embodied in the new law, have caused the doing away with the old, the thoroughgoing operation of which precedent has nullified.

Now, judicial modifications and special, or extraordinary, determinations create legal precedent; insomuch that a given adjudication, or court decision, may vary far from the meaning of some given statute, which, having passed through a career of being diversely applied and interpreted, is rarely in force in its actual status,—according to its strict content. As a consequence, precedent becomes law. As laws are modified by adjudication, they are thus rendered more and more null, and in this way many of them are finally set aside.

Thus substantive law (represented in America, we may say, by constitutions and statutes) has operating concurrent to it the uncertain force, precedent, which, legally, is set up by judicial interpretation and decision. Legal precedent is America's common law; and it is made formal law as the English common law was made of force,—by its constantly becoming statutory. The law is thus not only increasing because of social needs demanding legislation, but also by the making a part of its rules which have arisen from judicial discretion.

It may be said, however, that judicial discretion, the individual determinations of courts, may be and often is law before it has become so recognized as to become statutory. Else, how is it that the same formal statute, or constitutional doctrine, is interpreted and applied differently by different courts? If two courts apply the same law, the same legal principle, for entirely opposed reasons and with entirely opposed results, decision in either the one case or the other (or in both cases) has become law,—as is most evident to the reader. If, then, there shall follow, as is always the case, a series of decisions following in opinion one of these two primary decisions, and also a series of decisions following in opinion the other, we are then entered upon an era of conflict in which are engaged two vital, opposed forces: judicial precedent and substantive law.

Now, it will avail the legal critic nothing to contend that there should be no conflict,—that the course of legal science should run with that certainty and uniformity which knows no doubts or errors. For let the author assert now—*that common law and substantive law must inevitably and necessarily engage each the other forever.* (The author will not attach any formal significance to our two terms; for in its essence common law can be nothing but rules, recognized as law, which have arisen from either social or judicial custom; and substantive law, nothing but rules, recognized as law, which have emanated from formal sovereignty.) So that precedent and statute have between them a problem,—that of how, inasmuch as both must exist, they shall come together in as great a degree of uniformity and likeness as possible. Promulgated rules cannot provide perfectly for all future demands arising under them (to say nothing of those demands entirely unanticipated), and adjudication deviating from them must therefore necessarily follow, if man is to have justice which is of reason. So that man's problem is,—wherein can he reconcile the two forces in the highest possible degree, inasmuch as he desires all Law to have in its pathway as few contradictions (which breed uncertainty) as possible.

Now, it is most obvious that the highest uniformity,—which, of course, means highest justice, inasmuch as, for example, to decide one case strictly under

a statute or constitutional provision, and decide another case of like nature according to precedent or "case" rules, when the rules of the one lead to a different effect or result from one reached from following the other, cannot be conducive to justice,—that the highest uniformity, I say, can be attained only by recognizing both precedent and statute (which here includes formal constitutional law). The formally promulgated substantive law—in other words, the written laws—has been created as the result of man's experience concerning the respective subject-matters it treats, and therefore demands the attention of the world. Formally speaking, it is considered the Law, inasmuch as the general rule is that courts are to apply laws as they exist, as they are written. If the courts deviate from that law which alone has claim to formal sovereignty, it is not admitted that this has been done; but they hold that they have applied the law actually as it is supposed to be applied, positively as it exists. The deviating court holds that there has been no deviation, and declares that it has applied the law according to the best interpretation it could exercise. Yet we know that there has been deviation; and while perhaps one cannot safely say, in any particular case, that the court has failed to apply the law as created, as written, yet when two or more courts are opposed in their respective applications, each applying the law differently from the other, one can safely say that there has been deviation from the law as written. For, obviously enough, the law cannot have two directly converse meanings. So that one or more of the courts has deviated from the law. It is unnecessary for the author to cite the reader any instances in proof of this contention; modern law teems with them, —with contradictory applications of laws. Nevertheless, these contradictory deviations do not necessarily argue anything against the created laws, their merit or validity; though, of course, numerous contradictory applications of a law may lead to an investigation of it, and possibly a change in it. The substantive law is the positive law; the law which is the most permanent and secure, and which guarantees the greatest security in working out justice, for it is the most conservative and substantiated law. In the substantive law is found the refuge from the confusion inherent in precedent. The very changeable nature itself of precedent demands fixed, substantive law. Some of the modern critics indulge themselves in the delusion that in the continual application of many of the laws there is error; holding that society outgrows its laws and should be alert to set them aside, and even that courts should exercise a policy of disregarding strict legal construction and application. That society outgrows many of its laws is true, of course; and it changes many of them constantly; and courts sometimes disregard strict application with reason. But if the fanciful policy launched by many of the critics were followed, it would not be long before no one would know what the law was,—and even the critic himself, upon being appealed to as the last resort, would be unable to tell.

No; security of justice to man lies in legal science,—in the Law developed. That courts find it reasonable and proper to deviate from it at times argues nothing at all to the contrary. For when man has from periods of experience gathered truths which constantly reappear, he must necessarily *establish* justice in regard to them; and this establishment, which is so reasonable and necessary for security to justice, lies in fixed, permanent—the only coercive—law.

Nevertheless, deviation from substantive law is inevitable; for, as already indicated, cases arise which are not properly covered by a particular law sought to be applied to it, this being inevitably so in many instances. So that courts must often supply the Law where deficient. When this is done, and precedent in decision set up, it is not necessarily true that precedent is not as conducive to justice as the strict law. Often the precedent is better, and leads to an alteration or abolition of the law. It is not necessarily against justice, either, for courts to constantly seek the opinions of other courts, even in seeking for precedent; for the application of laws is the work of individual minds, and, inasmuch

as none can reasonably claim perfection, their co-operation is reasonably the best course. Besides, the inter-relation of the courts in their opinions is conducive to uniformity in the Law, which is most desirable. Too great care and co-operation in interpreting and applying laws is never to be feared, and proper precedent is as much the result of beneficial experience, claiming its sanction as much, as statutes. That which is constantly reappearing as true should set aside that which can claim no certainty, whether the former has arisen from general demands before the creation of a law, or afterwards from judicial determinations in applying the law.

The Law, thus, moves forward in being perfected in accordance with the advancement of substantive and precedent law towards the highest possible degree of harmony and unity. Great caution and care on the part of the legislator is conducive to the creation of the best and most suitable laws; just as care and discernment are so for applying laws. The nearer to perfection the former, the nearer perfect will be the latter. Created, written law, or all substantive law, is not prevented from entering into a bond of mutual progress with judicial precedent, for the progress of the one aids that of the other. The better the created law (the more just and practicable it is), the more suitable and proper will be its application; for if most errors are provided for in creation, there remain fewer to be met with or feared in application. So that the legislator and adjudicator are in their proper relation when there is sought the high ground of co-operation and unification of labors and purpose.

William W. Brewster.

The Courts as Builders

I do not claim that the courts do not err; they sometimes err signally and pronouncedly. I do not claim that they always administer justice with an even and exact hand, for judges are human and the passions and prejudices, the limited vision and the clouded mind which sometimes attach to their kind are also theirs. I do not claim that they are always free from political bias or at all times wholly exempt from that strange attachment which in a republic sometimes places party above the common welfare, for Presidents and governors and electorates in selecting judges do not always seek men most likely to resist such influences. But I do claim that of all the methods and contrivances and schemes which have been devised by the wit of man for the adjustment of controverted judicial questions and the administration of justice the courts and the machinery of the courts, built up from decade to decade and from century to century, built of the experience and the wisdom of a proud and freedom-loving race, the courts as they are built into our system, though not perfect, are the most perfect. They will not always be abreast of the most advanced opinions in the march of progress, but that they will in due time mortise and build into our jurisprudence all that is permanent and wise and just, all that a settled and digested public opinion finally indorses, no one familiar with the history of our jurisprudence can for a moment doubt.—Hon. William E. Borah.

A Question of Neutrality in China

BY GILBERT REID

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SINCE the war began in Europe, or, rather, since its interjection into Eastern Asia, China has been compelled to devote herself to the study of international law. The preservation of her neutrality has, of course, been her chief task. In doing this she has not had the help she deserved from other powers.

Of these questions of neutrality a very important one pertains to the Shantung railway, between the port of Tsing-tao and Tsinan Fu, the capital of the province, a distance of about 250 miles. At the latter place it connects with a railway which runs from Tientsin south to Nanking, the northern section being built by Germans with German capital, and the southern by the English with English capital. The Shantung railway has also been built by Germans with German capital, and is a credit to the solidity of German enterprise.

When Japan, after violating China's neutrality by the passage of Japanese troops across the Shantung promontory, and after being accorded a war zone for her military operations, proceeded to occupy with her soldiers the Shantung railway, the Chinese government presented to Japan several protests. The formal reply of the Japanese legation, found excuse for her action in the claim that the railway was not Chinese, but German. The railway, like most railways built in China, has depended indeed on foreign capital, but China in giving the concession never intended to give up her territorial or other sovereign rights.

In statements published in Japan, the charge was also made that China had previously allowed the Germans to violate China's neutrality by transport, on the railway, of troops and munitions of war, and therefore no complaint could now be raised against Japan. This charge, however, was not made officially in Tokio or Peking.

On October 10th the Chinese government entered a protest with the British government, but the reply was a confirmation of the right of the Japanese action, with special reference to this matter of transporting troops and munitions of war. This united action of these two powers, in a matter of law and right, has overwhelming force in comparison with any opinion or protest of China, and the utterance, being official, at least with Great Britain, practically forestalls any private opinion to the contrary.

Still, China should not be too easily frightened. The overwhelming duties of the British government connected with the European war can give no time for minute study of questions in China. It should also be borne in mind that this is only the judgment of belligerents on a matter which must finally be determined by the law of nations. This is not the first time that a neutral and a belligerent, in time of war, have disagreed.

This similarity in judgment only shows how real is the alliance between Great Britain and Japan, and how much more difficult is China's position in thinking or acting contrary to these two great powers.

A violation of China's neutrality must be the act of one of the belligerents. China's responsibility lies in permitting or in forbidding such violation. Strong states not only forbid, but actually take steps to resist, all violation of their neutrality. "If a state has neutrality laws, it is under obligations to enforce these laws." So, on the other hand, if a neutral state not only permits, but condones, any violation of her neutrality, she ceases to be neutral, and becomes a belligerent. "A neutral state," says Hall in his "International Law," "which overlooks such

violations of its neutrality as it can rightly be expected to prevent, or which neglects to demand reparation in the appropriate cases, becomes itself an active offender."

When China protested against Japan's open violation of all neutral laws in entering the port of Lungchau and forcibly landing her troops, China resisted in the only way that prudence could dictate. When she gave consent to Japan for a war zone, she made herself open to the charge from Germany of becoming "an active offender." When China again still more strongly protested against Japan's violation of neutrality in occupying Weihsien railway station, and then all the line to Tsinan Fu, territory outside the war zone, she again resisted in the only prudent way, with no chance for complaint from Germany. Whether China permitted any violation of her neutrality in what the Germans previously did on the Shantung railway is the question which is now to be examined.

The clash in all these cases is between German and Japanese action. China's responsibility has been so to permit or to forbid belligerent action as to keep within the law. Fortunately Great Britain, France, and Russia have themselves caused no worry in Shantung, though Great Britain, through her alliance, defends Japan in this particular case, as against Germany, and so against China.

Japan has claimed that she had the right to occupy this railway because it was a German, and in no sense a Chinese, railway, and because the railway agreement was one with the lease of Tsing-tao. At the same time Japan claims this right because China allowed a violation of neutrality through the transport of troops and munitions of war. These two reasons do not hold together. Only one is possible. If the railway is German, then the transport of munitions of war by the Germans and for the Germans has no relation to China's neutrality, and China is not to be judged. If the railway should be regarded as Chinese, running through Chinese territory, then China must see to it that her neutrality is not broken by the wrong use of that railway. China cannot be blamed for both conditions. It is clear to us that the railway, and the land across which it runs, unlike Tsing-tao, should be regarded at present as Chinese, and that under this supposition China must allow her attitude as to transport on that railway in war times to be tested by principles of international law.

The easier position to defend on the part of Japan is to claim—though the claim does not make it a fact—that the railway and railway zone are no concern of China, and therefore can be occupied. If this position is taken, neither Japan nor Great Britain should complain of China that she has permitted a German violation of China's neutrality through the wrong use of the railway.

Japanese papers have published an itemized list of German infractions of China's neutrality, twenty in all, concerning which the Chinese government is represented as doing nothing towards prevention. Half of these items were prior to Japan's declaration of war, and if any belligerent deemed it a duty to enter complaint, that government should have been the British, not the Japanese. In regard to all the twenty cases, Japan only entered complaint some time after the occurrence, or, to speak with strict correctness, defended her own violation of China's neutrality, in the face of China's protest, by claiming that China had permitted previous violation on the part of Germany. It is interesting to note the wide knowledge that the Japanese had, not only of their own country, but of China, as well, in presuming to inform China of what was going on under Chinese jurisdiction, but without Chinese knowledge.

The first of these items was that the American Standard Oil Company, on August 7th, sent from Tientsin to Tsing-tao four casks of kerosene. Now, under war regulations, kerosene is not contraband, and there was no reason to suppose that it was being sold to a belligerent acting as combatant. The kerosene was not sold by Chinese, but by an American firm, and China was not required to intervene or to enter complaint against another neutral power.

Some other charges are concerning Germans selling and sending to Tsing-tao

bread and wine, horses and blankets, cement and lime. Even if such sales were made, there was no necessity for the Chinese government to intervene or prohibit. The mere mention of such matters on the part of Japan shows how puerile has been her ground of complaint.

The main items may be summed up under two general heads, as stated in the despatch of the British government; namely, transport of German and Austrian troops over the Shantung railway, and the transport of munitions of war.

When the writer was in Peking, at the opening of the war in Europe, he was asked this question:

"What ought China to do about the legation guards and other foreigners who are to go as soldiers, traveling over our railways?"

The reply made offhand was, "Treat all alike. Don't bother about any of them, if they do not travel in uniform."

The Chinese government has done the only feasible thing under existing conditions. Nationals as reservists or volunteers of all the belligerent countries have traveled over all the railways of China, or by steamer along the coast and up and down the Yangtze. Expeditions have started from different ports of China for the seat of war in Europe, or else for Hongkong, Weihaiwei, Lungchau, or Tsing-tao. It would have been absurd for China, as a neutral country, to have involved herself in needless controversy with all the belligerent powers over action which international law has not defined as wrong. So long as all were treated alike, no belligerent should blame China.

When, in the early part of August, the writer traveled by rail from Peking to Shanghai, three cars from Tientsin to Tsinan Fu were full of Germans. Everyone knew that they were German business men and also reservists, going to Tsing-tao, but they traveled as civilians and without weapons. Mr. John Bassett Moore, in his Digest, has said: "The carriage of persons separately, though their individual design may be to enlist in a foreign strife, is not prohibited by our law, if the transportation is without any features of a military character." This reference is to recruits from a neutral people, but is equally applicable to those of a belligerent country traveling through a neutral country.

Such a question is very different from that of a body of soldiers, with guns and munitions of war, marching through neutral territory, as the Japanese in China, and the Germans in Belgium, have done, contrary to recognized rules in the law of nations. These latter were military expeditions.

The sending forth of recruits from Chinese ports is a much more serious matter. Strictly considered, it is contrary to international law. In one of the Hague Conventions is this article: "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents." This refers primarily to neutrals being recruited, but can apply to others, as is known in China. The reason why the Chinese government has not intervened is because she is not compelled as a neutral to go out of her way to inconvenience herself, and secondly, because her leniency, like any restriction, has been "impartially applied by it to both belligerents" and all belligerents.

These principles, summed up in the one word, "impartiality," free both China and Germany from fault as to the transport of Germans across the Shantung railway. It is to be doubted if any body of legal experts, not belligerent, will support the contention of Great Britain and her ally, Japan.

The second important matter to be studied is that of transport of munitions of war across the Shantung railway. It is much harder to determine the law on this matter than on that of transporting men intended for war.

Most of the items mentioned in Japanese papers, though not included in Japanese official despatches, cannot be verified. The charges were presented unofficially, but the mere lengthy enumeration has had sufficient power to deceive both Chinese and others, whether belligerent or neutral. For instance, it is charged that on August 17th a German went to the Southern Park, just south of Peking, and purchased from Chinese authorities ten mountain pieces, with rounds of ammunition, and sent them *via*

Tienstin to Tsing-tao. The Chinese Ministry of war has reported that on that date it sent an officer to bring into the city that number of guns, and that no German was known to be there. On the same day, according to Japanese accusation, two Germans bought from Carlowitz & Company, in Tientsin, thirty cases of explosive shells, and "about the 19th of August" some other Germans proceeded by land route all the way from Peking to Tsing-tao with ten cart loads of ammunition. These and similar cases all inquiries on the part of the Chinese government fail to confirm. If such things actually occurred, there is no reason for attaching blame to China in respect to violation of neutrality.

That neutrals of a neutral state have the "right to sell arms and munitions of war to all comers" is now acknowledged, though they must "run the risk of capture and condemnation." The risk taken is outside the neutral territory, and "on the high seas" alone. The fact of territory being neutral is a kind of covering to the acts of selling, buying, and transporting of arms and munitions of war. Thus in the present war, as in previous wars, Americans have sold and transported across the country arms for belligerents. Lawrence's "International Law" says: "It is only when they *export* such articles to one belligerent that the right of capture is acquired by the other. Transport within the neutral territory is not forbidden."

In the case of China in relation to Germany there can be no offense on the part of the neutral country, namely, China, and it is doubtful if any can be attached to the belligerent country, namely, Germany. The Germans are accused of selling to Germans, and transporting through neutral territory to German Tsing-tao, such munitions of war as are classed as contraband. It would seem as if the principle ought to be the same for such a transaction as where neutrals are active parties in the transaction. Only on the *high seas* would they run a risk of capture and confiscation. For the British government to buy guns and motor gun-carriages in America, and send them by freight into Canadian territory, is similar to that of German action in China.

Almost an identical example is found in the Boer war. The Transvaal and Orange Free State received recruits and supplies by rail through Portuguese or neutral territory, and from a Portuguese harbor. Great Britain never reproached Portugal, though it tried to exercise its rights of capture on the high seas. When three German vessels were seized for carrying passengers under suspicion of being recruits, and for carrying ammunition supposed to be destined for the Boers, Germany entered protest, and Great Britain then ordered the release of the three ships. There was no thought of making seizure on the railway or of reproaching the action of neutral Portugal.

A neutral state, such as China, is not obligated to lay upon itself extra burdens by searching for contraband in the possession of any belligerent. "Dealing in contraband," says Mr. John Bassett Moore, "is not an act which it is the duty of the neutral state to prevent." And again: "Neutral states are deemed to have discharged their full duty when they submit to the belligerent enforcement," that is, on the high seas alone. Woolsey expresses the same idea: "It is difficult for a government to watch narrowly the operations of trade, and it is annoying for the innocent trader. Moreover, the neutral ought not to be subjected by the quarrels of others to additional care and expense. Hence by the practice of nations he is passive in regard to violations of the rules concerning contraband, blockade, and the like, and leaves the police of the sea and the punishing or reprisal power in the hands of those who are most interested. The neutral is passive, and leaves the law of nations to be executed by others."

Another feature of contraband trade deserves some attention. "No penalty," say Wilson and Tucker, "attaches to the simple act of transportation of contraband. It is the hostile destination of the goods that renders them liable to penalty." All the cases cited in the treatises on international law refer to a destination which must be reached by sea, where alone the belligerent is "liable to pen-

alty" from an enemy. The belligerent, moreover, not the neutral, is liable to penalty, if the goods are in the possession of the belligerent. Should we suppose that the principle applies equally to transportation of contraband over a land route to a "hostile destination," China, the neutral nation, who is not in possession of the contraband, is not by any conceivable reasoning "liable to penalty," and yet the Chinese are to be punished in the form of Japanese occupation, because the Chinese government, it is charged, allowed her neutrality to be broken. The facts are: First, that the neutrality, if broken at all, was not broken by China; secondly, that China could not be "liable to penalty;" and, thirdly, that even granting such liability, the wrong kind of penalty was inflicted, namely, occupying the Shantung railway and neutral territory. Should it be said that the penalty was for the Germans, because the railway was German, remember, as said above, there could be, under that supposition, no violation of China's neutrality, and China ought not to be blamed.

As a matter of fact the Chinese government has fully, one might say, excessively, recognized her obligations as a neutral state. She has done this by putting the emphasis on impartiality, the essence of all neutrality. If China cannot be blamed for permitting what was permissible, she ought to be credited with special fidelity to duty, when she has placed restrictions on actions which might be construed as doubtful, if not culpable. Only three belligerents needed to be watched at all in reference to the carriage of arms and ammunition—Germany, Great Britain, and Japan. Whether Great Britain carried any guns, rifles, and ammunition from the legation headquarters to Tientsin has not been reported, but she certainly carried them by rail or ship from Tientsin to Weihaiwei, a temporary British possession. Japan was near enough to home supply to need no purchase or transportation in China, and yet in a most overt manner, with full military character, she proceeded to send troops, guns, and other supplies across China's neutral territory. China did not venture to resist, seize, or confiscate, but she did the only thing open to her,—she protested.

Germany's actions were very early brought to the notice of the Chinese authorities, and wherever anything noticeable in the way of transporting munitions of war occurred, China acted promptly. While from the point of view mentioned above China need not have done anything, yet to show that she was not partial to Germany in the least degree, she proceeded in Tientsin, Tsinan Fu, and Hsu-chowfu to detain different supplies of guns and ammunition for further investigation. If any country could complain of China's action, it would be Germany, and not Great Britain or Japan; that is, if the recognized principles and usages of all the great nations concerning contraband are to be applied in China and to China.

Thus deducting the items in the Japanese list, of which there could, under the strictest rule, be no offense, and those of which there is no verification, and those where China detained the contraband, there is really nothing about which Japan or Great Britain can reproach China, a neutral power, or Germany, a belligerent power. This being the case, there is no excuse for Japan to have occupied the Shantung railway, or for Great Britain to approve Japan and blame either China or Germany.

Gilbert Reid

The Missouri Land

BY A. M. CRAVEN

of the Spokane (Wash.) Bar

AN ENVELOP lay upon the only table of the Bledson home, addressed: "Collector of Taxes, Canaanville, Mo." "Jim Bledson," said Amanda, his wife, "you are sending our last cent to pay the taxes on that good-for-nothing land again."

"Yes, Mandy," replied Jim, "The taxes is due and must be paid; that land will make us rich yet."

Thus started the fiftieth annual quarrel in the Bledson home, over the "Missouri land." In 1860 James Bledson, then recently married, had purchased "side unseen" 160 acres of land, on or near the Merrimac river, in the state of Missouri.

The purchase was made on the glowing representations of the owner's agent, that same was fine agricultural land, capable of raising 80 bushels of corn to the acre, close to church and school, and but few miles from railway. It was in Jim's mind to sell his only other property, 30 acres in the Hocking Valley, and take his bride to this Western Eden, accumulate wealth, and die rich.

He was soon awakened from these pleasant dreams by certain adverse reports. Mrs. Bledson's cousin, county surveyor of a nearby county, and, at his cousin's request, journeyed down to this land of Canaan, and inspected the land. He reported same 45 miles from railway, and no church nor school nearer than Canaanville, 23 miles distant. The land he reported rocky, with gravelly soil, and sparsely covered with scrub oak. He pronounced the land not worth the taxes, and concluded by facetiously advising Mr. Bledson to quitclaim the land to a ground hog, apparently its sole occupant. The impression made on Amanda's mind by her cousin's report was immediate and fixed. The taxes, though small in amount, had frequently taken all the money on hand, and deprived Amanda of many a small comfort of life. As the years passed, the Missouri land proved to be a lasting source of marital infelicity, which arose at tax-paying time to a flood of tears and upbraiding. Jim Bledson, notwithstanding the adverse report, had, very early in his ownership, conceived the notion that the land was very rich in iron deposits. This notion was first obtained from reading an old leather-covered book, the only book beside the Bible in which Jim took any stock. This book, printed in 1819, was "The American Universal Geography, or a View of the Present State of All the Kingdoms, States, and Colonies, in the Known World," by Jedidiah Morse, D. D., Minister of the Congregational Church in Charleston. In this geography Jim read that iron ore was to be found in great abundance on the Merrimac river, in Missouri Territory.

This notion ripened into an abiding conviction in later years, when the collector wrote that the Vulcan Iron Company had paid the year's taxes, and Judge Peck had told Jim that someone was probably trying to get title to the land by adverse possession. "Adverse possession," said the Judge, "is the only way provided by law for one man to appropriate another man's real estate." "They can't get it," continued the Judge, "just by paying the taxes, but look out for fellows getting on the land."

"Nobody on the land at last account but an old ground hog," Jim rejoined.

It was a favorite thrust of Mrs. Bledson to compare her husband to Squire Hawkins in the "Gilded Age:" "This old Hawkins starved his family, holding on to that worthless Tennessee land, and died hugging his old deed to it, and he had refused $40,000 for it. You are just like him, Jim."

"I may be like Squire Hawkins in some ways, but if anybody ever offers me $40,000 for this land I shall accept it," said Jim calmly.

Soon after this conversation a stranger appeared at the Bledson farm, and introduced himself as Mr. Perkins.

"Mr. Bledson," said Perkins, "I am one of the directors of the Ozark Iron, Lead, & Milling Company. You have some land in Dent county, Missouri, with which I am familiar. This land may be worth $1,000, and it may be worth $100,000. My company thinks it worth $40,000 and I am here to offer you that price, $500 down and the balance when our lawyers pass the title.

"Stranger, you have bought something," answered Jim.

Here his wife spoke up, "Jim Bledson, are you going to be fool enough to sell that land for $40,000 when it's worth $100,000 and like as not a million?"

"Exactly," answered Jim.

"Mr. Perkins," continued Jim, "my title is as clear as a whistle; I bought from Dennis Dwyer, and he had a United States patent. Here are both papers, and you see they were both recorded in 1860."

"I have no doubt your title is all right," replied Perkins, "but our lawyers will want an abstract of the title, and will give us a written opinion, and we will be governed by their opinion."

Jim and Mr. Perkins then went to Athens, the county seat, and Judge Peck drew up a contract of sale in accordance with the offer of purchase.

Two weeks later Jim received a letter post-marked Canaanville, Missouri, which proved to be from Perkins, and read as follows:

"We have had your title examined, and it is like this: Dennis Dwyer, after he deeded the land to you, deeded it to John K. Hertzler; Hertzler then deeds to Hukill, and Hukill deeds to Felker. They had a big fire at Canaanville in 1866, and the court-house and all the records were burned up. Your deed was recorded in 1860. All these other deeds have been made since the fire. A copy of the United States patent has been recently put on record, so the records show no title whatever in you, and a clear title in Felker. Our lawyers at St. Louis advise us that Mr. Felker had a right to go by the record and can hold the land. We shall, therefore, deal with Felker. I am exceedingly sorry to ask you to return the $500 paid you."

This letter upset many a delightful plan of the old couple. They had already contracted to sell the little 30-acre farm, intending to move to Athens. Jim had planned, immediately on receipt of the money, to take Amanda on a visit to the many wondrous places of which he had read in Morse's Geography. The one great desire of his heart was to visit the tomb of St. Aspinquid on Mt. Agamenticus, on the New Hampshire seaboard. In his sixty years' reading of Jedidiah Morse's Geography his interest never flagged but once, and that was when the bees swarmed, when reading the geographer's account of St. Aspinquid, his many journeys from the Atlantic Ocean to the "California Sea," his tomb on Mt. Agamenticus, still existing, and the marvelous sacrifice of wild animals made by the Indians, at his funeral obsequies.[1]

This wonderful account he had frequently recited to Judge Peck, who on one occasion somewhat angered Jim by expressing a doubt as to its historical accuracy.

The next day after receiving the letter from Perkins Jim laid it before Judge Peck, who promised to investigate the law of the case, and give his opinion three days later.

Jim appeared promptly at the appointed time to receive the Judge's opinion.

[1] On page 326, that great geographer says: "St. Aspinquid was born the year 1588, was more than forty years of age when converted to Christianity; he died May 1st, 1682, aged ninety-four years, on Mt. Agamenticus, where his sepulchre remains to this day. The Sachems of the different tribes attended his funeral obsequies, and made a collection of a great number of wild beasts to do him honor by a sacrifice; on that occasion, agreeable to the customs of those nations; and on that day were accordingly slain 25 Bucks, 67 Does, 99 Bears, 35 Moose, 240 Wolves, 82 Wild Cats, 3 Catamounts, 482 Foxes, 32 Buffaloes, 400 Otters, 620 Beavers, 1,500 Minks, 440 Ferrets, 520 Raccoons, 900 Mushquashes, 504 Fishers, 3 Ermines, 38 Porcupines, 50 Weasels, 852 Martins, 59 Woodchucks and 112 Rattlesnakes. He was a preacher of the Gospel to sixty-six different nations for fifty years, from the Atlantic Ocean to the California Sea."

"Jim," asked the Judge, "you did not burn that court-house?"

"Judge," replied his client, "you know I have never been out of the state of Ohio."

"It occurred to me when I started on my investigation of the matter, that you did not burn up the records, and, being without fault, ought not to lose your property. The fire was probably an *actus Dei.*"

"Quite likely," said Jim, "but what is that, Judge?"

"Act of God, but you keep still, I am doing the talking. It is a great privilege for a lawyer to talk at someone who does not understand a word he says. You see, Jim, it sort of keeps him in practice."

"All right, Judge, act of God at Canaanville is where you left off."

"This deed bears the certificate of the county clerk and recorder to the effect that it was recorded in Book 'C' of Deeds at page 649, on August 15th, 1860. This certificate is attested by the seal of the circuit court. The government patent also appears to have been duly recorded. The Statutes of Missouri provide that a duly recorded deed 'shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice.' The supreme court of that state held that the destruction of the records by fire does not impair the constructive notice given by the filing of the deed for record.[2] The supreme courts of Illinois, Indiana, Minnesota, and several other states, have anounced the same rule. All of these cases, and all the cases in the United States on the question, are cited in a case note to Cooper v. Flesner, 23 L.R.A.(N.S.) p. 1180. The editor of those reports is correct in his statement, which I shall read to you:

"'The cases are practically unanimous in holding that the destruction of the record of a deed or mortgage does not, in the absence of a statutory provision to the contrary, destroy its effect as constructive notice, and that consequently a bona fide purchaser or encumbrancer without actual notice, subsequent to the destruction of the record, is as much affected by the constructive notice as if the record had not been destroyed."

"That is the law, Jim," concluded the Judge.

"I do not understand a word of it," said Jim, "Have I lost the land?"

"Jim, the land is yours, and that man Felkus or Feltis, or whatever his name is, has no more right to it than a jack-rabbit," said the Judge.

"Or a groundhog," added Jim.

"We start for St. Louis to-night, Jim," said the Judge.

"And fight 'em to the last ditch, Judge," added Jim.

"Jim," replied the Judge, "we will try this lawsuit in the office of these St. Louis attorneys. In other words, I will show them that they are wrong in their opinion of the law."

"That will be a whole lot cheaper for me. I will not have to pay a great big fee for fighting a lawsuit," replied Jim.

"Shades of St. Aspinquid!" the Judge exclaimed, "Don't you know that it is worth four times as much to a client to get his case settled out of court as in court?" "You may fortify your mind to pay a good fee if this sale goes through."

"I know you will do what is right by me," said Jim.

Jim and Judge Peck went to St. Louis, where the Judge had little difficulty in satisfying the attorneys for the vendee that the title was good, and upon the payment of the balance of the purchase price the "Missouri land" passed from James Bledson to the Ozark, Iron, Lead, & Milling Company.

Judge Peck presented Jim a bill for $500 and travelling expenses,—Jim offered $5,000. After several hours of negotiation a compromise was effected, and the judge accepted $3,500,—the biggest fee he had ever received.

"Jim," said Amanda, on his homecoming, "I always knew that the Missouri land would make us rich."

"Yes, Mandy," replied Jim, "you are entitled to most all the credit for our

[2] Greer v. Missouri Lumber & Min. Co. 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; Manwaring v. Missouri Lumber & Min. Co. 200 Mo. 718, 98 S. W. 762.

good fortune, but you must remember that the first knowledge that it was full of iron I got from Jedidiah Morse's "Universal Geography."

"Judge," asked Mrs. Peck, the night he returned from St. Louis and reported to her the receipt of his fee, "is $3,500 all you got on the Missouri land case?"

"Yes, my dear," he replied, his exultation shaded a little with disappointment, as he glanced from his paper inquiringly.

"Oh nothing. I was just thinking it seems small for one of your experience, after you saved the whole $40,000."

And the Judge wound up the clock, put the cat out, and started off to bed.

A. M. Craven

The Law

And what a profession it is! No doubt everything is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life,—so share its passions, its battles, its despair, its triumphs, both as witness and actor?

But that is not all. What a subject is this in which we are united,—this abstraction called the Law, wherein, as in a magic mirror, we see reflected not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle. If we are to speak of the law as our mistress, we who are here know that she is a mistress only to be wooed with sustained and lonely passion,—only to be won by straining all the faculties by which man is likest to a god. Those who, having begun the pursuit, turn away uncharmed, do so either because they have not been vouchsafed the sight of her divine figure, or because they have not the heart for so great a struggle. To the lover of the law, how small a thing seems the novelist's tales of the loves and fates of Daphnis and Chloe! How pale a phantom even the Circe of poetry, transforming mankind with intoxicating dreams of fiery ether, and the foam of summer seas, and glowing greensward, and the white arms of women! For him no less a history will suffice than that of the moral life of his race. For him every text that he deciphers, every doubt that he resolves, adds a new feature to the unfolding panorama of man's destiny upon this earth. Nor will his task be done until, by the farthest stretch of human imagination, he has seen as with his eyes the birth and growth of society, and by the farthest stretch of reason he has understood the philosophy of its being.—Hon. Oliver Wendell Holmes.

The Elusive Fifty Per Cent

BY LESLIE CHILDS

I WAS excited to a considerable degree, and about as mad as it is possible for a white man to get and not break an artery, so I went to see a lawyer. He sat before me, rubbing his hands in a soothing manner, while I was reciting my story, and at its conclusion said:

"Yes, I will be pleased to take your case. You have been treated in a most shameful manner by this greedy, grasping corporate monster, and I have no doubt but what a jury of your peers will bring it to its senses." "But," I meekly inquired, "what is all this going to cost me? Suppose I lose the case; suppose you are not able to convince the jury of the justness of my cause."

"In that case," replied my friend the attorney, "it will cost you nothing to speak of, a few little fees for filing the papers perhaps, nothing more. You will owe me nothing, for I will take the case on a contingent fee. That is to say, for a sum equal to fifty per cent of what I succeed in recovering." "You mean," I answered in a weak fashion, just to show him I knew what he was talking about, "you will take the case for fifty per cent of what ever you recover."

"No, no!" he exclaimed, and looked at me very much as a kindergarten teacher would look at an exceedingly dumb five-year-old,—"I mean just what I say. I will take the case for a sum equal to fifty per cent of what I recover. I wouldn't dare take the case for fifty per cent of what I recover, for that kind of a contract would be champertous and void, and might even lead to my disbarment. I trust you understand." And he smiled upon me in a condescending manner.

But he was mistaken, for I did not understand, and, moreover, I had even forgotten my grievance against the railroad company, in the attempt to follow my friend's linguistic contortions. So, turning on him in a firm but patient manner, I informed him that I did not understand, but that I would understand, before I allowed him to proceed for the infinitesimal part of an inch.

"Do you, or do you not," I demanded, with considerable heat, "get fifty per cent of what you recover?" "I most certainly do not," he replied, glaring at me. "Then be kind enough to explain to me, in plain everyday English, just what you do get," I requested in a sarcastic tone. "With great pleasure," he laughed, "I get for my fee a sum equal to fifty per cent of what I recover."

"Oh, very well, then," I returned, "if you recover a judgment for one thousand dollars, you take five hundred of it for your fee, is that the idea?" "Most assuredly that is *not* the idea," returned my friend as he arose and lit his pipe as though preparing for a siege. "That is not the idea," he repeated, "if I recover a thousand dollars for you I do not get a single cent of it. I simply get a sum equal to fifty per cent of it. Now, do you understand?"

"Well, what in thunder is the difference?" I exploded. "If you take fifty per cent of what you recover, or a sum equal to fifty per cent of what you recover? On the basis of a thousand dollar judgment you'd get five hundred dollars, wouldn't you?" and I looked at him in a withering way.

In a patient manner he shrugged his shoulders, then giving me a look of contempt, tempered with pity, he exclaimed, "No, William, they are not the same by any means. If I were to make a contract with you for fifty per cent of what I recover, the contract would be of no value to me; I could not enforce it because the law says it is champertous.

"I see the point you wish to raise as to their being one and the same thing. It is a point that has been raised many times by laymen, who lack legal train-

ing, and I will probably have some difficulty in making it clear to you, but let me assure you there is a great difference.

"Now, were I to take fifty per cent of what I recovered, I would be taking fifty per cent of what I recovered, wouldn't I?" "Of course wou would, you booby," I exclaimed, "what are you doing, trying to talk in engaging similes?" "But," he continued with a shade of annoyance playing over his features, "If, instead, I take a sum *equal*—get a grip on that little word—to fifty per cent of what I recover, I am not taking as my fee any part of what I recover. Therefore the contract is all right and can be enforced.

"For where I take as my fee a sum equal to fifty per cent of what I recover, the amount of recovery is used as a basis for computing what the fee will be, and for no other purpose. I am not interested in that particular money; all I care about is to know the amount of it; then you must pay me a sum equal to fifty per cent of it. You understand now, I suppose?" He smiled at me in an aggravating way.

"No!" I yelled, "I don't understand, and no one but an imbecile, or one mentally unbalanced, would talk as you do; you reason like the sign on a Chinese laundry looks!" and I started to leave his office in disgust. But before I could reach the door, his hand was on my shoulder in a caressing way, and, gently restraining me, he began all over again.

"Now, William, if I were to take fifty per cent of what we recovered, the contract would be null and void, for it would be one the law holds to be champertous. The law does not permit an attorney to take as his compensation any part of the spoils of a suit. To do so would encourage litigation, and it is the duty of the courts to suppress lawsuits.

"But by taking a sum equal to fifty per cent of what is recovered, I am not taking a single cent of the money recovered. I am simply using the amount of recovery as a yard stick, with which to ascertain the amount due me. You see now, of course, just how it is, and no doubt admit the law is right in this, now that you understand."

By this time I was in a dazed condition, and virtually reduced to a mental pulp; so, clutching the pen I signed the contract he pushed toward me. I didn't even read it, but hastily left the office as one in a dream. Half a block down the street the thing got to running in my mind in such a provoking manner that I entered the office of another lawyer friend of mine, and in an offhand way asked:

"How do you take these personal injury cases, Harry? I mean as to the fee part of it." "Oh, usually on a contingent basis," he replied. "You mean you take a certain per cent of whatever you recover?" I returned. "Oh no, not by any means," he answered, "That would be illegal, and we could not collect on a contract of that kind. We take a sum equal to a certain per cent of what we recover."

There it cropped up again, "a sum equal to fifty per cent, etc.," and with a groan I demanded. "Show me where on earth you lawyers get such law from." "Why," he said, as he looked at me in a compassionate way, "that's an easy thing to do," and opening a volume he handed it to me.

At a glance I saw in the headnote, before I even got into the body of the case, that the decisions was one in which the court began talking, "sum equal to fifty per cent," so with a bang I dropped the book on the table and retreated.[1]

Leslie C. Childs

[1] For the law on this point, see Scobey v Ross, 13 Ind. 117.

Editorial Comment

Our heritage the sea.—Cunningham.

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Enforcement in Admiralty of Lien for Repairs to Aeroplane

THE jurisdiction of admiralty of a libel *in rem* for repairs to an aeroplane was considered by the United States district court for Washington in The Crawford Bros. No. 2, 215 Fed. 269. The counsel for the libellant, Mr. Wedell Foss, of Tacoma, conceded that there was no precedent for the proceeding, but contended that, as jurisdiction in admiralty has in the past been extended to meet the needs of commerce and the questions arising therefrom, in the face of this new need the jurisdiction should grapple with the questions arising out of the navigation of the air, and not await legislative action.

Judge Cushman in his opinion observes: "Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to include steam vessels upon their advent, holding floating elevators, dry docks, rafts, and submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore. The progress thus shown, it is asserted, warrants the court in assuming jurisdiction of this cause."

Reference is then made by the court to the proposed International Code of Aerial Law elaborated by the International Juridic Committee on Aviation which was organized at Paris in 1909, and has held annual congresses, at Paris in 1911, at Geneva in 1912, and at Frankfort in 1913. The committee itself consists of jurists, lawyers, and legal students in France, Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, United States, Italy, Morocco, Netherlands, Argentina, Russia, Switzerland, Turkey, Sweden, Great Britain, Canada, and Egypt. The national membership forms a national committee acting through a representative executive committee in Paris. The latter makes general studies upon a point of law, and issues its preliminary decisions to national committees, which report back their opinions, the whole of which are harmonized so far as possible. The text decided upon in this way is definitely passed at annual congresses.

Here we have an interesting sidelight upon the effect of war in checking

learned enterprises and rendering co-operation between scholars of different countries impossible. A great majority of the nations represented on the committee are now engaged in the world war. It is uncertain when they may be able to resume their correspondence and deliberations. Law and Progress must wait upon Mars and Destruction.

"An examination of the text of the code decided upon by the committee shows," continues Judge Cushman, "a striking similarity between its provisions, in many respects, and the rules now applicable to water craft. This appears in the rules as to the nationality and registration of air craft, flag regulations, documents, the law applicable in different jurisdictions and beyond the limits of any terrestrial jurisdiction, the requirements as to the logbook, and the aerial rules of the road, although air craft would not all, necessarily, move in the same plane. While the committee has gone into much detail, and the analogy between air and water craft is strikingly manifested in the proposed code, it has not yet become law. Undoubtedly it would be important to consider its provisions, in determining what was reasonable and proper in a cause involving air craft, in a common-law action. It is noticeable that, while recognizing the necessity, so far the proposed code contains no adaptation or modification of the terrestrial common or statute law, nor any application or modification of its principles, which will undoubtedly be necessary in view of the passage of such craft over such jurisdictions, and their manifold relations thereto. . . .

"In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libellant must be relegated to the common-law courts, courts of general jurisdiction.

"The action of the Juridic Committee on Aviation manifests a recognition of the fact that legislation is necessary for the regulation of air craft. They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime."

Use of Foreign Flags in War Time

WHEN Great Britain hoisted the American flag on one of her passenger liners that the submarine-infested war zone might be crossed in safety, our government protested, stating that it felt "certain anxiety in considering the possibility of any general use of the flag of the United States by British vessels traversing those waters, since the effect of such a policy might be to bring about a menace to the lives and vessels of United States citizens."

The British note in reply declared that the instance was one where, under the principles and usages of international law, a belligerent merchant vessel is permitted in time of war to use a neutral flag in an emergency, for the purpose of escaping capture. It disclaimed any intention of advising its merchant shipping "to use foreign flags as a general practice, or to resort to them otherwise than for escaping capture or destruction."

Since our formal protest was against "any general use" of the flag of the United States, and since Great Britain has assured us that her merchant vessels will not use our flag as "a general practice," the purpose of our protest was achieved.

Should we allow the merchant marine of belligerent countries to indiscriminately fly our flag to deceive their enemies, it would soon cease to afford protection to American citizens and to the American merchant marine. The ultimate result would be that it would inevitably lead us into serious international difficulties, and would make the flag a byword between the belligerent powers, as well as among neutral powers everywhere.

The records of international law contain few instances in which the use of a foreign flag on a merchantman has come into question. Our own vessels

during the Civil War many times used the British flag as a means of protection from capture by Confederate cruisers.

Dr. Taylor in his American work on International Law says: "At sea as on land, the use of false colors in war is forbidden. When a vessel is summoned to lie to, or before a gun is fired in action, the national colors should be displayed. And yet it is lawful to use false colors as a ruse, as Nelson did while he lay off Barcelona, for a long time showing the French flag, with the object of drawing out the ships of Spain, then allied with France."

A celebrated case of the successful use of a neutral flag during time of war is a classic in naval history. It was that of the Confederate sloop of war Oneida, which approached Mobile harbor in 1862 under the British ensign. Captain Preble, in command of the Federal blockading fleet, caused a blank shot to be fired across the Oneida's bow, but not in time to prevent the Confederate vessel from running the blockade and entering Mobile harbor, where it found shelter.

Captain Preble was dismissed from the naval service on the ground that he had not adopted sufficiently vigorous measures to stop the Oneida, but he was afterward restored to the Navy by action of the captain of the Oneida, who, in disregard of his own personal safety, passed through the Union lines, visited President Lincoln at the White House, and testified that Captain Preble had discharged his full duty under international law.

When Captain Glass, commanding the United States cruiser Charleston, on his way to the Philippines with a convoy of troops, stopped and captured Guam, he ordered the Japanese flag to be flown on his flagship and other ships. He signaled this message to the steamers Australia, Peking, and Sydney, merchant ships, under charter to the government and in use as troop ships:

"Passing signal station at Guam, Charleston will hoist Japanese colors; other vessels same or none."

During the present war a German cruiser, the Emden, flew a neutral flag, not for defensive but for offensive use, and, thus disguised, entered the port of Penang, and there destroyed British merchant vessels anchored within the harbor. The exploit is regarded as one of the most daring in all naval history.

Exalting American Citizenship

A MOVEMENT has been inaugurated in Minnesota to make more impressive the naturalization of foreigners, so that they may have a deeper impression of the sacredness of the vows of allegiance. This commendable example is being followed in other sections of the country. The naturalization mills in the district courts throughout the United States have turned out half or full fledged American citizens in two minutes' time. In place of this hurried process, impressive ceremonies have been introduced here, to give the aspirants for citizenship the sense of sacredness of citizenship and reverence of the flag. Judges of the Federal courts are adopting the idea.

The national colors will be displayed, according to the new procedure, and the presiding judge will make a brief statement relative to the benefits of citizenship in the United States. Everyone in the courtroom will stand while the clerk administers the oath in a dignified manner.

But the idea is not to be permitted to stop at that point. A call has gone forth to make July Fourth Americanization Day. "Citizenship receptions" are planned by many cities as a part of their Independence Day programs. The purpose is to add dignity to the ceremony of naturalization, and at the same time impress its meaning upon all citizens.

The idea arose in Cleveland in 1914, when the "Sane Fourth Committee" assumed the responsibility for a program arranged by a committee representing all local patriotic and civic organizations. Through the clerks of naturalization, the names and addresses of aliens admitted to citizenship during the preceding year were secured, and invitations for the reception were sent to each. At the reception, each new citizen

on entering the auditorium and showing his ticket, was presented with a small American flag, and also a seal button of the city with the word "Citizen" upon it. A platform decorated with the flags of all nations was reserved to seat the new citizens. The audience itself was secured by general publicity through the newspapers, which gladly gave publicity to the idea. The program opened with national airs. This was followed with the unfurling of a large American flag, the "Star-Spangled Banner" being sung, and the "Pledge of Allegiance" being recited in unison. Officials representing the nation, state, and city, made addresses, followed by a speech of appreciation by one of the prominent foreign-born citizens.

Such receptions should have great civic value. They would make July the Fourth a day of inspiration—the occasion for a new declaration of citizenship for foreign born and native born alike. They would tend to bring our citizens together as one nation in thought and purpose, ideals and achievement.

Professional Ethics

THE Committee on Professional Ethics, of the New York County Lawyers Association, has answered recently several questions as follows:

Question: Will you please answer whether or not an advertisement of the following kind is ethical:

"Will handle a few deserving law cases without any fees except actual court costs and expenses. P. O. Box —."

Answer: In the opinion of the Committee the advertisement is improper. Such solicitation of employment, whether gratuitous or not, is derogatory to the dignity of the profession, and too readily opens the door to imposition. The Committee again calls attention to Canon 27 of the Canons of Ethics of the American Bar Association.

Question: A lawyer's former client has been duly and legally committed to an asylum as a person of unsound mind; but he conceives himself to be wholly competent and therefore illegally restrained; he frequently solicits the lawyer's assistance to secure his release; the lawyer has no doubt of his incompetency or of the propriety of his commitment and retention, and knows of no justifiable ground for assisting him; but the lawyer is advised by his client's physician that it will improve his client's physical and mental condition to believe that the lawyer will assist him, and consequently both physician and members of the incompetent's family have importuned the lawyer to deceive his client into the false, but to him reassuring belief, that his lawyer is endeavoring to secure his release.

In the opinion of the Committee should the lawyer refuse to humor his client and to yield to the importunities?

Answer: However laudable the physician's proposal may appear from a medical point of view, the lawyer in the case suggested is, in the opinion of the Committee, not warranted in using the fact of his official position to carry out the deception.

Justice is that virtue of the soul which is distributed according to desert.—Aristotle

Animals — killing dog for worrying cat. That a cat is within the protection of a statute authorizing the killing of a dog found worrying, wounding, or killing any domestic animal, is held in Thurton v. Carter, 112 Me. 361, 92 Atl. 295. Recent cases on the right to kill dogs are appended to the foregoing decision in L.R.A.1915C, 359.

Attorney — aiding mob — discipline. That an attorney at law may be suspended from practice for actively participating in the acts of a mob which takes undesirable citizens from a jail, deports them from the town, and forbids their return, is held in the Oregon case of State ex rel. McLaughlin v. Graves, 144 Pac. 484, annotated in L.R.A.1915C, 259.

Bank — appropriation of trust fund — liability. That a bank generally has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him is held in Walters Nat. Bank v. Bantock, 41 Okla. 153, 137 Pac. 717, L.R.A.1915C, 531, but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.

Bank — breach of trust — liability. A bank with knowledge that a fund on deposit with it is a trust fund cannot, it is held in Allen v. Puritan Trust Co. 211 Mass. 409, 97 N. E. 916, appropriate that fund for its private benefit, or, where charged with the knowledge of the conversion, join in assisting another to appropriate it for his private benefit, without being liable to refund the money if the appropriation is a breach of trust. The liability of a bank for failure to prevent misappropriation of funds by a fiduciary is the subject of the note appended to the foregoing decision in L.R.A.1915C, 518.

Bankruptcy — sale for full price — hindering creditors — refusal of discharge. That an insolvent who in good faith sells his property for a full price to a corporation organized to purchase it for the purpose of dividing the proceeds equally among his creditors cannot be denied his discharge in bankruptcy because he had actually hindered nonconsenting creditors in enforcing their claims, is held in Re Julius, — C. C. A. —, 217 Fed. 3, annotated in L.R.A. 1915C, 89.

Carrier — alighting from moving train — negligence. A passenger is held negligent, in the Kentucky case of Hayden v. Chicago, M. & G. R. Co. 170 S. W. 200, accompanied with supplemental annotation in L.R.A.1915C, 181, in alighting from a slowly moving train

in the dark, on the side opposite the station, at a place which he knows to be more or less encumbered by *débris*, after he has stood on the step some time waiting for the train to slow down so that he could alight, which will prevent his holding the carrier liable for the injury in case he trips and falls under the train, although the train jerks at the moment he is stepping off.

Carrier — attempting to board moving train — negligence. A railroad company is held not liable, in the Michigan case of Murphy v. Pere Marquette R. Co. 150 N. W. 122, L.R.A.1915C, 536, for injury to a passenger who, having left the car at an intermediate station for exercise, is some distance from the train when the starting signal is given, and, with parcels in his hands, runs to and attempts to board the train, when it is rapidly picking up speed, so that he collides with an express truck left standing beside the track, and falls under the train.

Carrier — expulsion of sick passenger — liability. A statute authorizing the expulsion of passengers who do not pay their fares is held in Buckley v. Hudson Valley R. Co. 212 N. Y. 440, 106 N. E. 121, annotated in L.R.A.1915C, 134, not to apply in case of a passenger whose effort to pay is ineffectual because of illness, in view of a rule of the carrier that a passenger must not be ejected who is in such feeble or helpless condition as to be unable to take care of himself at the point of ejection.

Carrier — sleeping passenger — duty with respect to collecting fare. A carrier is held not liable for ejecting a passenger for nonpayment of fare, in Chesapeake & O. R. Co. v. Friend, 159 Ky. 778, 169 S. W. 509, L.R.A.1915C, 148, where he failed to respond to three efforts by the conductor to arouse him from sleep due to intoxicants and loss of sleep, to secure his fare, and made no response until he had been pushed out onto the platform in the process of ejection.

Constitutional law — impairment of contract — contemplation of change. An ordinance raising the rates to be charged by a public service corporation above those at which it had contracted to render service to a consumer is held in the California case of Pinney & B. Co. v. Los Angeles Gas & Electric Corp. 141 Pac. 620, annotated in L.R.A.1915C, 282, not to impair the obligation of the contract, since it will be presumed that the contract was made in contemplation of the power of the public to fix the rates.

Contract — sale of real estate — statute of frauds — acceptance on broker's authorization. Where the memorandum of sale of real estate must be signed by the grantor to satisfy the statute of frauds, it is held in Lusky v. Keiser, 128 Tenn. 705, 164 S. W. 777, annotated in L.R.A.1915C, 400, that a binding contract is not effected by the purchaser's written acceptance upon a written authorization by the seller to a broker to effect a sale, which contains a full description of the property, price, and terms of sale, but omits the name of the vendee.

Criminal law — consumption of liquor by jury — effect. All the courts express strong disapproval of the use of intoxicating liquors by jurors, and regard such use as misconduct which is censurable or punishable, but, with a few exceptions, the cases do not regard the mere fact that a juror has indulged in the use of intoxicating liquor during a trial as, in itself, ground for setting aside the verdict. While a few cases seem to adopt the rule that any use of intoxicants by a jury will vitiate its verdict, and others adopt such a rule when the liquor was used while the jury was deliberating, the general rule is that a new trial will not be granted because of misconduct in this regard, unless, because of the quantity used or of its noticeable effect upon those using it, prejudice may reasonably be presumed. When it appears that any of the jurors were visibly affected by the intoxicants taken, the verdict will generally be set aside, unless the use was at such a time, as during a recess of the court, that it would not be likely to im-

pair the jurors' ability to give intelligent consideration to the case. The case of Myers v. State, 111 Ark. 399, 163 S. W. 1177, annotated in L.R.A.1915C, 302, holds that the consumption by ten of the twelve jurors sitting in a criminal case which results in conviction, of 6½ quarts of whisky during the little more than three and one half days that the trial lasted, is ground for new trial, although there is testimony that none of them were intoxicated and that the liquor did not influence the verdict.

Damages — injury to automobile. That damages for loss of use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure, and not for rent or profit, is held in Cook v. Packard Motor Car Co. 88 Conn. 590, 92 Atl. 413, annotated in L.R.A.1915C, 319, which further decides that evidence of the rental value of an automobile is admissible upon the question of the compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it or use it for profit. It is further held that the reasonable amount which the owner of an automobile is compelled, under his contract, to pay his chauffeur during the time that his car is out of use through an injury caused by another's negligence, if the owner had no other use for the services of the chauffeur, may be allowed as a part of the damages for the injury to the car.

Damages — punitive — indifference to rights of passengers. Punitive damages are held allowable in the South Carolina case of Woodward v. Southern R. Co. 83 S. E. 591, annotated in L.R.A. 1915C, 477, in favor of excursionists against a carrier the managing officers of which, with knowledge that they had been detained by a storm, and with indifference to their rights, send the train which was to carry them home away with empty cars, leaving insufficient equipment to transport them on later trains.

Descent — murder of ancestor — effect. The murder by an heir of his ancestor is held in Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785, accompanied by supplemental annotation in L.R.A. 1915C, 328, not to interfere with the operation of the statutory rules of descent; at least where the Constitution provides that conviction of crime shall not work forfeiture of estate, and the penalty for murder is merely death or imprisonment.

Elections — voting machines — local option. A constitutional provision that all elections by the people shall be by ballot, although adopted before the invention of voting machines, is held in the Indiana case of Spickermon v. Goddard, 107 N. E. 2, L.R.A.1915C, 513, not to preclude the use of such machines, and therefore a local option election is not invalidated by the fact that the voting was done by machines instead of paper ballots.

Electricity — unanticipated injury — liability. An electric railway company which maintains an uninsulated wire carrying a heavy current, in a cut under a street below the level of the adjoining property, is held not liable, in the Washington case of Kempf v. Spokane & I. E. R. Co. 144 Pac. 77, L.R.A. 1915C, 405, for injury to a boy who throws a wire over the charged one from the top of the adjoining bank, since it is not bound to anticipate such an occurrence.

Electricity — uninsulated wire — liability for injury. One maintaining, some distance from the ground, an uninsulated wire carrying a heavy current of electricity, is held not liable in Green v. West Penn R. Co. 246 Pa. 340, 92 Atl. 341, L.R.A. 1915C, 151, in case boys throw a piece of wire which they find on the road, over the one carrying the current, for injuries to another boy who takes hold of the one so thrown to recover it, since there was no obligation to anticipate such an occurrence.

Entireties — effect of divorce. That a divorce destroys an estate held by the parties by entireties, and they thereafter hold the property as tenants in common,

is held in McKinnon C. & Co. v. Caulk, 167 N. C. 411, 83 S. E. 559, accompanied by supplemental annotation in L.R.A. 1915C, 396.

Food — liability of manufacturer. A manufacturer who prepares food for human consumption and places it in the hands of a dealer for sale is held responsible in damages, in Parks v. C. C. Yost Pie Co. 93 Kan. 334, 144 Pac. 202, L.R.A.1915C, 179, to the widow of a consumer who procures such food from the dealer and loses his life by partaking of it.

Guardian and ward — effect of consent to ward's purchase. A guardian's knowledge of and consent to the purchase of an automobile by his minor ward, and his furnishing the money to pay for it from the ward's estate, are held in the Michigan case of Reynolds v. Garber-Buick Co. 149 N. W. 985, not to make the contract binding on the minor upon his reaching maturity. The effect upon a ward's contract of his guardian's consent thereto is discussed in the note appended to the foregoing case in L.R.A. 1915C, 362.

Husband and wife — imprisonment of husband — action by wife. A wife, it is held in the Vermont case of Neiberg v. Cohen, 92 Atl. 214, L.R.A.1915C, 483, cannot, either at common law or under the married woman's act giving her a right to hold separate property and sue alone, recover damages for loss of companionship and support, from persons who have successfully conspired to induce her husband to commit an offense for which he was imprisoned, where they intended to injure him, and not her. This seems to be a case of first impression.

Husband and wife — liability for services of attorney to wife. A man is held not liable, in Meaher v. Mitchell, 112 Me. 416, 92 Atl. 492, for services of an attorney rendered at the request of his wife, in consulting merchants as to furnishing credit to the wife pending divorce proceedings, since she might have applied directly for credit on her own behalf. Recent cases on the liability of a husband on a wife's contract for attorneys' fees in divorce proceedings accompany the foregoing decision in L.R.A.1915C, 467, the earlier authorities having been presented in 24 L.R.A. 629, and 13 L.R.A.(N.S.) 244.

Indemnity — retailer — negligence — neglect to inspect. That a retailer of oil bearing the proper inspector's stamp does not have a reinspection when the quality of the oil is questioned by customers is held in the Iowa case of Pfarr v. Standard Oil Co. 146 N. W. 851, not to prevent his recovering from the manufacturer the amount he is compelled to pay a purchaser for injury due to an explosion of oil, although the statute provides that whoever sells such oil which has not been inspected and branded, and which emits combustible vapor at less than a certain temperature, shall be liable for all damages caused thereby. The right of one liable for damages from a defective article to recover over against the vendor or manufacturer, is the subject of the note accompanying the foregoing decision in L.R.A.1915C, 336.

Insurance — employer's liability — malpractice of physician. Insurance of an employer against loss arising from claims on account of bodily injury accidentally suffered by an employee of insured by reason of the prosecution of the work in which the employer was engaged, and the various departments thereof, and dependent and connected operations and parts thereof, is held in the Washington case of May Creek Logging Co. v. Pacific Coast Casualty Co. 144 Pac. 67, not to cover a claim for malpractice by a physician furnished by the employer according to custom and contract, to treat an employee injured in the business, from whose wages a fee has been deducted to cover medical atttention. Recent decisions as to what injuries are covered by an employers' indemnity policy accompany the foregoing case in L.R.A.1915C, 155, the earlier adjudications having been presented in 30 L.R.A.(N.S.) 1192.

Insurance — facts learned after application — duty to notify insurer. That an applicant for life insurance who has answered "No" to an inquiry whether or not he had ever had renal colic is bound, under penalty of forfeiting his policy, to notify the insurer in case he subsequently has such an attack before the policy is issued, is held in the Tennesee case of Harris v. Security Mut. L. Ins. Co. 170 S. W. 474, L.R.A.1915C, 153.

Insurance — laying vessel up for winter. A policy on a vessel warranted employed in general passenger and freighting business on a designated sound is held in Canton Ins. Office v. Independent Transp. Co. — C. C. A. —, 217 Fed. 213, annotated in L.R.A.1915C, 408, not to cover it while it is laid up for the winter in a river flowing into the sound.

Insurance — picnic wagon — common carrier. That a rig let by a transfer company by the day to the public generally for picnic parties to be controlled by its own employees and carry only those invited by the hirer, is not, although the company is as to other parts of its business a common carrier, a public conveyance provided by a common carrier for passenger service, within the meaning of a policy insuring against injury to persons while passengers in such conveyances, is held in the Alabama case of Georgia L. Ins. Co. v. Easter, 66 So. 514, L.R.A.1915C, 456. The earlier cases construing such an accident policy provision are gathered in 37 L.R.A. (N.S.) 618.

Landlord and tenant — assignment of reversion — liability on covenants. The owner of a building leased a portion of it, and in the lease covenanted to furnish heat to the tenant. It thereafter sold the property to one who assumed all its obligations under the lease, and the tenant recognized the grantee as landlord. It is held in Glidden v. Second Ave. Invest. Co. 125 Minn. 471, 147 N. W. 658, that the original lessor was not thereafter liable to employees of the lessee for damages for personal injury resulting from negligent failure to properly heat the premises. The cases treating of the transfer by a landlord of the reversion are appended to the foregoing decision in L.R.A.1915C, 190.

Landlord and tenant — assignment of reversion — right to re-enter. That an assignee of the reversion of a leasehold cannot enter because of rent which was due and unpaid at the time of the assignment is held in the Rhode Island case of Barber v. Watch Hill Fire Dist. 89 Atl. 1056, which is accompanied in L.R.A.1915C, 245, by a note on the right of a transferee of the reversion as to breaches of covenant occurring before the transfer.

Lien — consent to sale of property — waiver. A landlord with claim for unpaid rent and a mortgagee of the tenant's chattels are held in the Iowa case of Hoyt v. Clemans, 149 N. W. 442, annotated in L.R.A.1915C, 166, not to waive their liens on the tenant's property by consenting to its sale on condition that a certain person act as clerk of the sale and apply the proceeds on their claims, so as to subject the proceeds to garnishment in the hands of the clerk at the suit of a judgment creditor of the tenant.

Master and servant — duty to foreman — approach of train. A railroad company, it is held in the Kentucky case of Cincinnati, N. O. & T. P. R. Co. v. Eastham, 169 S. W. 886, L.R.A.1915C, 27, owes no duty to a foreman of a gang engaged in construction work along the track whose duty is to know the time for the passing of trains, keep the track clear, and protect the men working under him from injury, to keep trains under control, keep a lookout for persons on the track, or give warnings of the approach of trains which are practically on time, so that failure to do so may render it liable under the Federal employers' liability act for injuries inflicted upon him by a train which hits him.

Master and servant — employers' liability act — who is employee. That a locomotive fireman who, in response to a call for duty, takes a customary path

across the company's tracks to assume his duties, is, after entering on the company's property and while traveling along the path, an employee within the meaning of an employers' liability act making employers liable for injury to employees during the course of their employment, is held in Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L.R.A. 1915C, 39.

Master and servant — Federal employers' liability act — negligence of employees. The negligence of employees of a railroad company in pushing another employee out of a car door to his injury, while they were wrestling inside the car, is held in the Washington case of Reeve v. Northern P. R. Co. 144 Pac. 63, L.R.A.1915C, 37, not to be within the operation of the Federal employers' liability act, providing that an interstate carrier shall be liable to an employee engaged in interstate commerce for injuries resulting in whole or in part, from "negligence of any of the officers, agents, or employees of such carrier," since the negligence must, to come within the statute, occur in the course of their employment.

Master and servant — Federal employers' liability act — who entitled to benefit of. A boiler maker's helper engaged in repairing an engine regularly employed in interstate transportation, and which was destined for return thereto upon completion of repairs, is held in Law v. Illinois C. R. Co. 126 C. C. A. 27, 208 Fed. 869, L.R.A.1915C, 17, to be employed in interstate commerce and within the protection of the Federal employers' liability act.

Municipal corporation — injury on playground — liability. A municipal corporation is held not liable, in Bernstein v. Milwaukee, 158 Wis. 576, 149 N. W. 382, for injury to a child on a playground maintained by it because of the negligence of an attendant in permitting him to use apparatus designed for the use of older children, and which was dangerous for him to use. This decision is accompanied in L.R.A.1915C, 435, by the recent cases on the liability of a municipal corporation for an injury through unsafe conditions in parks or public grounds other than streets.

Municipal corporation — legislative control — revision of rates. Under constitutional provisions making municipal corporations subject to general laws, it is held in State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 Pac. 861, annotated in L.R.A.1915C, 287, the legislature may confer upon a commission created under constitutional authority the power to revise rates established by a franchise conferred upon a telephone company by a municipal corporation which had not been given express power to fix rates, where under the Constitution all laws relating to corporations may be altered or modified.

Negligence — sale of gun to boy — liability for resulting injury. The mere sale of a gun to a fifteen-year-old boy in violation of ordinance is held in Hartnett v. Boston Store, 265 Ill. 331, 106 N. E. 837, annotated in L.R.A.1915C, 460, not to render one liable for an injury done by his loading and firing the gun, if there was no reason to anticipate probable injury because of the carelessness of the boy or his lack of skill in the use of firearms.

Principal and agent — contract with agent — suit by undisclosed principal — defense. That one who has entered into a contract with an agent cannot, if there was no fraud, such as denial of the principal's existence, defeat liability for breach to an undisclosed principal by establishing that he would not have entered into the contract with the principal had he been disclosed, even though the principal suspected that he could not secure the contract himself, is held in Kelly Asphalt Block Co. v. Baker Asphalt Paving Co. 211 N. Y. 68, 105 N. E. 88, L.R.A. 1915C, 256.

Public Service Commission — rates fixed by municipality — change. The Public Service Commission, it is held in the West Virginia case of Benwood v. Public Service Commission, 83 S. E. 295,

annotated in L.R.A.1915C, 261, may change a public service rate which was fixed for a municipality by franchise ordinance prior to the enactment of the law creating the Commission, where authority to fix such rate was not expressly delegated to the municipal corporation by the legislature.

Railroad — contract for loading logs — monopoly. It is unlawful for a common carrier to discriminate between shippers. On the question as to what constitutes a discrimination, the Mississippi case of Yazoo & M. Valley R. Co. v. Crawford, 65 So. 462, L.R.A. 1915C, 250, is a valuable decision, in that it brings out clearly the distinction between conferring an exclusive privilege relating to a matter outside the legal duties of the carrier, and conferring a grant with reference to a matter within the legal duties of the carrier to perform under its contract of carriage. The case holds that an exclusive contract between a railroad company and a private corporation to load the logs of private shippers between stations along the railroad right of way is not invalid as creating a monopoly or granting special privileges to such corporation, since the loading between stations is not a service which the railroad company is bound to undertake, and if it does undertake it for the convenience of shippers it may place such restrictions on it as it sees fit.

Robbery — picking pockets. Merely inserting one's hand into another's pocket, and abstracting therefrom loose change, with intent to steal it, is held in the Missouri case of State v. Parker, 170 S. W. 1121, L.R.A. 1915C, 121, not to come within a statute making everyone guilty of robbery who feloniously takes the property of another from his person and against his will by violence to his person.

Shipping — act of God — striking submerged obstruction. That a vessel struck its propeller on a submerged obstruction in deep water several miles from land is held in Alaska Coast Co. v. Alaska Barge Co. 79 Wash. 216, 140 Pac. 334, annotated in L.R.A.1915C, 423, not to show that the injury was caused by an act of God within an exception of liability in a charter party, although it was an inevitable accident.

Statute — foreclosure sale — notice to redemptioners — retroactive effect. A statute requiring a purchaser at foreclosure sale to notify persons entitled to redeem before taking his deed is held not retroactive, in the South Dakota case of Clark Implement Co. v. Wadden, 149 N. W. 424, when applied to existing purchasers, if at the time of its passage ample time for the notice remains before the expiration of the redemption period. The applicability to existing purchasers, of a change in the law relating to redemption from judicial sales, is considered in the note appended to the foregoing decision in L.R.A.1915C, 414.

Statute of frauds — written confirmation of parol agreement. Where, after a written contract for the sale of land has been entered into, the seller signs an undertaking to find a purchaser at an advanced price, within a stated time, it is held in Hurless v. Wiley, 91 Kan. 347, 137 Pac. 981, L.R.A.1915C, 177, that the buyer may obtain damages for the breach of the agreement evidenced by such subsequent writing, upon proving by parol evidence that the consideration for it was an oral promise to the same effect, made when the original contract was executed.

Tax — request for bills — omission — validity of sale. That a request for tax bills on a list of property is not a sufficient attempt to pay the taxes to render void a sale for nonpayment upon certain parcels included in the list, for which no bills were received, is held in the Arkansas case of Price v. Gunn, 170 S. W. 247, which is annotated with recent decisions in L.R.A.1915C, 158, the earlier authorities having been discussed in 20 L.R.A. 487.

Tax — succession — securities of nonresident. Notes belonging to a nonresident secured by mortgage within the state, which were taken by a resident agent to whom money was intrusted for

investment, may be subjected to collateral inheritance tax, upon the owner's death, it is held in the Iowa case of Re Adams, 149 N. W. 531, L.R.A.1915C, 95, although just prior thereto they were all removed from the state, if the agent retains control of them by virtue of his agency.

Tax — suit to set aside sale — repayment. In setting aside a void tax sale at the instance of the taxpayer, it is held in Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, annotated in L.R.A. 1915C, 492, that the court should make repayment of the tax and those subsequently paid by the purchaser with interest from the respective times of payment less rents received, a condition to afford the relief sought.

Telegraph — disclosure of contents of message — liability. The liability of a telegraph company for disclosing the contents of a message was considered in the Mississippi case of Western U. Teleg. Co. v. McLaurin, 66 So. 739, annotated in L.R.A.1915C, 487 which holds that one cannot hold a telegraph company liable in damages for his humiliation and loss of social caste and business opportunities through its disclosure to strangers of the contents of a message showing, in connection with the proof that he is compelled to introduce to make a case, that he was maintaining illicit sexual relations with the sender.

Water company — franchise — competition by municipality. A town granted to a water company the right to construct and operate waterworks for a term of years to supply the town and its inhabitants with water for fire, domestic, and other purposes, the right to lay and maintain its pipes in the streets and alleys of the town for this purpose, and the exclusive right to furnish the town with water for public purposes, such as the extinguishment of fires, the flushing of sewers, and the sprinkling of the streets; and the town agreed to pay stipulated prices for the water for public purposes, to protect the company in its use of the streets, in the construction and use of its waterworks, and in the collection of its water rates. The water company accepted this grant, executed the contract, and constructed and operated its waterworks. On this state of facts it is held in Glenwood Springs v. Glenwood Light & Water Co. 121 C. C. A. 88, 202 Fed. 678, annotated in L.R.A. 1915C, 438, that the grant and contract did not exclude the town from the right to construct and operate waterworks to supply its inhabitants with water for domestic and other purposes, in competition with the company, and that an injunction restraining it from so doing could not be sustained.

Recent English and Canadian Decisions

[NOTE.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Abatement and revival — action for breach of promise — continuance against executor. An action for breach of promise to marry cannot, after the death of the defendant, be continued against his executor on the ground of loss suffered by the plaintiff through having given up a profitable business at the request of the deceased, and in consideration of his promise to maintain her till marriage and to marry her; the fact that it was a term of the contract by the deceased to marry the plaintiff that she should give up her business, and that he should maintain her, not preventing the action from being a personal action, and the loss sustained by the plaintiff not being special damage flowing from the breach of the promise of marriage. Quirk v. Thomas [1915] 1 K. B. 798.

Broker — commissions — agreement to pay commission on all "accepted orders." A broker who is to receive a commission of 5 per cent on all "accepted orders" obtained by him, to be

"payable immediately the order is shipped," but to be charged against the broker should the customer fail to pay, is entitled to a full commission on a contract obtained by him whereby the purchaser agreed to purchase from his principal during one year paper of a specified kind to the extent of not less than $35,000, to be furnished from time to time on receipt of specifications and directions as to destination, though the purchaser, after a partial performance, refused to furnish further specifications on the ground that the paper was not satisfactory. Whyte v. National Paper Co. 51 Can. S. C. 162.

Collision — tug and tow — joint liability. A tug and a barge which it is towing, engaged in the business of a common owner, the barge having no propelling power nor steering apparatus, so that its navigation was controlled by the officers and crew of the tug, to which it was attached by a short tow line, must be regarded as one ship, and each is liable for the consequences of a collision. The A. L. Smith v. Ontario Gravel Freighting Co. 51 Can. S. C. 39.

Descent and distribution — homicide of ancestor as affecting devolution. The rule that a person criminally responsible for the killing of another is disqualified from taking under the will of the deceased does not, it seems, apply where the author of the homicide was of unsound mind; still less is he disqualified from receiving his proper share of the intestate estate of the deceased, the distribution of whose property is regulated by the positive provisions of the statute law. Re Houghton, 31 Times L. R. 427.

Insurance — arbitration clause — repudiation of liability by insurer as waiver of. That an insurer who has repudiated all liability on a fire insurance policy on the ground of fraud and arson cannot, on those issues being found against him, thereafter rely on a provision of the policy making it a condition precedent to any right of action thereon that the amount of the loss should be first determined by arbitration, —is held by the House of Lords in Jureidini v. National British & I. Millers' Ins. Co. 84 L. J. K. B. N. S. 640.

Partnership — implied authority of partner to borrow money. A partnership firm engaged in the business of owning and managing moving picture theaters is not a trading firm within the rule that each member of a trading firm has implied authority to borrow money for partnership purposes on the credit of the firm. Higgins v. Beauchamp, 84 L. J. K. B. N. S. 631.

War — prize — cargo shipped by neutral to enemy under c. i. f. contract. A cargo which a neutral has contracted, in time of peace, and not at a time when war was imminent or anticipated, to sell to a German at a price to include cost, freight, and insurance, payment to be made "by check against documents," is not, while in transit and before the shipping documents had been tendered to and taken over by the buyers, and before the bill of exchange for the price had been paid, subject to seizure or capture as enemy's property. The Miramichi, L. R. [1915] Prob. 71.

Wills — mutual wills — right of survivor to revoke. A will being by its nature and in its very essence a revocable instrument, a will made by the survivor of two persons who had executed mutual wills operates to revoke the prior will, and must prevail as the last will and testament of such person; though the breach of the agreement not to revoke may give rise to a trust to the extent of the benefits received from the cotestator. Heys's Estate, L. R. [1914] Prob. 192.

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He is truly wise who gains wisdom from another's mishap.—Publius Syrus.

Quite A Come Down. "When this suit was commenced," said a counselor of the Nevada bar, "the Silver Mining Company was a great corporation. Its stock sold on the San Francisco stock board for $300 a share, with dividends of $10 a month. In its mansion its directors had champagne and terrapin dinners every Saturday night, and, after dinner, through the moonlight midnight, and until the hush of the Sabbath morn, they played draw poker, with blue chips, and the ceiling for a limit. They had a United States Senator and an ex-United States District Judge for the company lawyers, and the stockholders walked along, snuffing the stars.

"Now, gentlemen of the jury, how are the mighty fallen, *tempora mutantur nos et mutamur in illis,* which may be liberally translated, 'Formerly a lordly race horse, now a wood packing jackass.' The stock has fallen to $6 a share, and there has been no dividend declared since the dawn of creation. The menu of the directors' dinner is pork and beans and sour beer. They play poker with white chips with bets limited to 10 cents, with every player squealing for a sight all the time. They have struck hot water and desert sand in the mine, and come down to this jack-legged, cock-eyed, ragged-breeched spawn of the devil for a lawyer."

An Unusual Death Sentence. The best anecdote of Judge Benedict is that told relative to his sentence of death pronounced upon José Maria Martin, who was convicted of murder in the district court of Taos county, New Mexico, in the territorial days, under a state of facts showing great brutality.

"José Maria Martin, stand up! José Maria Martin, you have been indicted, tried, and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, it is a painful duty, José Maria Martin, for a judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind of the court naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features, and the court takes positive delight in sentencing you to death.

"You are a young man, José Maria Martin, apparently of good physical constitution and of robust health. Ordinarily you might have looked forward to many years of life, and the court has no doubt that you have, and have expected to die at a green old age; but you are about to be cut off, in consequence of your acts, José Maria Martin. It is now springtime; in a little while the grass will be springing up green in these beautiful valleys, and on these broad mesas and mountain sides the flowers will be in bloom. The birds will be singing their sweet carols, and nature will be putting on her most attractive and most gorgeous robes, and life will be pleasant, and men will want to stay; but none of this for you, José Maria Martin. When these things come to gladden the senses of men, you will be occupying a place about two by six be-

neath the sod, and the green grass and the beautiful flowers will be growing above your lowly head.

The sentence of the court is that you be taken from this place to the county jail; that you be kept there safely and securely confined and in the custody of the sheriff until the day appointed for your execution (be careful, Mr. Sheriff, that he will have no opportunity to escape, and that he be at the appointed place at the appointed time). That you be kept so, José Maria Martin, until ———.

"Mr. Clerk, on what date does Friday, about two weeks from to-day come?"

"March the 22d, your Honor."

"Very well, until Friday the 22d of March, when you will be taken by the sheriff from your place of confinement to some safe and convenient spot within the county. (This is to your discretion, Mr. Sheriff, you are only confined to the limits of the county), and that you be hanged by the neck until you are dead, and the court was about to add, 'may God have mercy on your soul,' but the court will not assume the responsibility to ask an All Wise Providence to do that which a jury of your peers refused to do. The Lord could not have mercy on your soul.

"However if you have any religious belief, or are connected with any religious organization, it might be well enough to send for your priest or your minister and get from him,—well, such consolation as you can, but the court advises you not to place any reliance upon anything of that kind.

"Mr. Sheriff, remove the prisoner."

The most curious part of this is that the next day the convicted and sentenced man escaped, and remained a fugitive for twelve years, when he fell from a wagon and was killed.

Injudicious Advice. An amusing scene was enacted in a certain country court room some time ago. The justice, a big pompous official, with a voice like a trombone, took it upon himself to examine a witness, a little, withered old man.

"What is your name?" asked the justice.

"Why, squire," said the astonished witness, "you know my name as well as I know yourn."

"Never mind what I know or what I don't know," was the caution given with magisterial severity. "I ask the question in my official capacity, and you are bound to answer it."

With a contemptuous snort, the witness gave his name, and the questioning proceeded:

"Where do you live?"

"Well, what next?" ejaculated the old man. "Why," he continued, appealing to the laughing listeners, "I've lived in this town all my life, and so's he," pointing to the justice, "an' to hear him go on you would think—"

"Silence!" thundered the irate magistrate. "Answer my question or I'll fine you for contempt of court."

Alarmed by the threat, the witness named his place of residence, and the examination went on.

"What is your occupation?"

"Eh?"

"What do you do for a living?"

"Oh, git out, squire! Just as if you don't know that I tend gardens in the summer season and cut wood in the winter!"

"As a private citizen I know it, but as the court, I am not supposed to know anything about you," explained the perspiring justice.

"Wal, squire," remarked the puzzled witness, "if you know somethin' outside the court room and don't know nothin' in it, you'd better get out an' let somebody try this case that's got some sense."

The advice may have been good, but it cost the witness forty shillings.—London (Eng.) Paper.

Suffering Cats! A lawsuit in New York over a $30,000 bequest to a London "Cats' house" has brought out testimony that two elderly spinsters of London, one on a bicycle and the other on a tricycle, each with a basket, searched parks and alleys of the English capital and collected 479,000 stray cats in fifteen years. So many cats were captured that it was necessary to hire a house where they were either fed to sleekness and farmed out, or put to death with chloroform. Four

hundred and seventy-nine thousand cats seems a good many; but London is a big city, and perhaps the story may be true.—Boston Globe.

Had Credentials. Justice William Grantham, of the King's Bench Division, was a good deal of a character. He was noted for what was regarded as too great freedom of speech in his judicial opinions.

A story about Sir William was that, after protesting vainly to a man who was smoking in a nonsmoking railway carriage, he sought to impress the offender by handing him his card, with a threat to have the man arrested at the next station. But the man left the compartment quickly when the train stopped, and took a seat in another compartment. Justice Grantham sent the guard to get the man's name and address so that he could be prosecuted. When the guard returned he said:

"I wouldn't have him arrested, sir. I asked his name, and he gave me this card. You see, he is Mr. Justice Grantham, sir."

Euphemistic. It was in a small southwestern town that the town council, which we infer is becoming unduly delicate, caused this notice to appear in the local newspaper when a tax on dogs was imposed:

"Tax on each dog—male, $1; vice versa, $3."

A Traveling Opinion. Mr. Fazakerly, an eminent counsel, was once stopped by a country gentlemen, a neighbor, who asked him about some point then very important to him, and got the opinion verbally. Some time after, the gentleman called on the counsel, and said he had lost £500 by his advice, as it was a wrong opinion. The counsel said he had never given an opinion, and, turning to his books, said he was confident of that. Being reminded that it was given during a drive the neighbors had one summer's day near Preston, the lawyer replied: "Oh, I remember now, but that was only my traveling opinion; and, to tell the truth, neighbor, my opinion is never to be relied upon unless the case appears in my fee book."—Madras L. J.

Consoling a Mourner. In the office of the clerk of the superior court of Mecklenburg county is recorded a will which goes from the sublime to the ridiculous. The opening paragraph reads as follows:

"Know all men by these presents that I, ———— of the County and State aforesaid, knowing the uncertainty of life and that it is appointed for all men to die, doth make and constitute this to be my last will and testament. First of all, I bequeath my soul to God, who gave it, and my body to its Mother Earth, and it is my will that my Executors have erected at its head the best station marble monument that they can procure, and for what worldly property it has pleased God to bestow on me, it is my will that it be disposed of in the following manner."

The greater number of the items following are disposals of various slaves, and real estate. But paragraph 21 reads as follows:

"I will to Wm. Boyles one barrel of whiskey, and I want my executors to purchase it and send it to him."

An Even Trade. A traveling salesman for a Gansevoort street wholesale grocery firm, recently back from a trip through the rough lands of eastern Pennsylvania, tells this possibly true tale:

"One day on my last trip I had a 6-mile ride to make to the county seat, and the small village in which I was had only one horse that I could hire, and no other form of conveyance. I may say that a friend had landed me in the town that morning from his car, and I had sold goods enough to pay the expenses of the trip.

"Well, I got away on the sorriest specimen of a horse I ever straddled, and I was to send him back by the mail carrier; though not as a parcel post package. It took me two hours to cover the distance,—I was sorry enough I hadn't walked,—and as I passed the county jail on my old bag of bones a face grinned at me from between the bars of a small square window. I was too sore to smile, but I nodded to the grin, and the prisoner called to me:

" 'Say, mister,' he said, 'how'd you like

to trade that critter for thirty days in jail?'

"Just then I would have been glad enough to have traded, but the law wouldn't let me, and I rode on."—New York Sun.

Legal Fictions. A Missouri judge, traveling on circuit, once had before him in a small country town a case in which a tavern keeper was held for the payment on a land transaction of a large amount of money which he had not agreed definitely to pay. The court declared that, although his agreement was not on record, it was involved by construction, or implied, in his participation in a business proceeding connected with it.

After judgment had been rendered the court adjourned for dinner, and the judge found that the only eating-house in the place was the inn kept by the defendant in the case he had just decided. He also found that the defendant personally superintended the preparation of the meals, and that the food was charged for on the European plan.

The judge called for two boiled eggs, which, with the other food he ordered, were brought to him done to a turn. He ate them, and at the end of the meal the bill was presented to him. He was astonished to read on it the following items:

Two boiled eggs ..... 15 cents
Two chickens at 75 cents each $1.50

Calling the proprietor he asked: "How's this? I've had no chickens; why do you charge me for them?"

"Those are constructive chickens, your Honor," answered the innkeeper.

"What?"

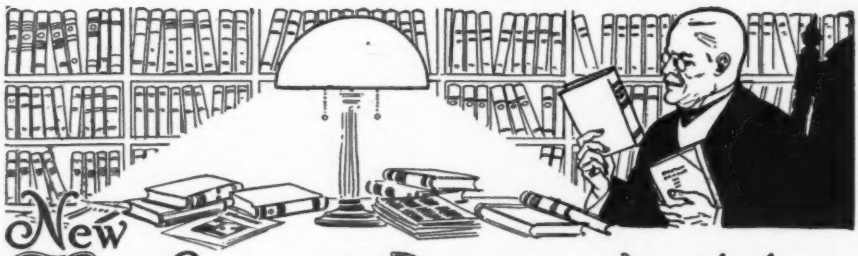
"Why, they are implied in the eggs, you know," the man persisted.

His Honor began to understand, and said no more.—New York Times.

What Becomes of French Criminals. In France a criminal who is classed as incorrigible is either sent to the Islands of Safety, off the Guiana coast—of which Devil's island, where Captain Dreyfus languished, is one—or to St. Laurent or St. Jean, a little higher up the river. In this terrible climate, with the scorching sun beating down upon them, the criminals are made to work in the gold mines or opening up the jungle, and as the officers in charge have virtually unlimited power over them, they are often ill treated. The inhabitants of these prisons range from murderers of the worst type to professional thieves and desperadoes. About one fifth of the criminals are women, and—a thing that seemed incomprehensible to me—were permitted to marry the male convicts. In some cases wives had joined their convict husbands. What dreadful children must be raised in this atmosphere of crime and brutality!

Escape is the one thought of the convict. The doors leading to the jungle are not guarded any too well, and the officers in charge do not seem to care if a criminal escapes into the forest, knowing very well that men seldom get away alive from this terrible region of deadly malaria and ferocious wild beasts. Fugitives have also to reckon with the natives, to whom the hunting of convicts is great sport.—Wide World.

Napoleon a Great Reader. Napoleon not only read a great deal, but read with profit. His memory was extraordinary. Take for instance his knowledge of Roman civil law, long passages of which he once reeled off by heart, to the astonishment of the state council engaged with him in the production of the Code Napoleon. To one of the councilors he explained how he gained his legal learning. When a young lieutenant he found in the cupboard of a prison room in which he was confined a ponderous tome of Roman law. "You can easily imagine," he said "what a valuable prize that book was. . . . When, at the end of ten days, I recovered my freedom I was saturated with Justinian and the Roman legal decisions." Napoleon added that the old book was covered with marginal notes,—so much so that he could not have been idle if his imprisonment had "lasted a century."—London Chronicle.



New Books and Recent Articles

The pen is the tongue of the mind.—Cervantes

"The Trial of Leo Frank." Reuben R. Arnold's Address in His Behalf. (Classic Pub. Co., Baxley, Ga.) 50 cents.

The trial of Leo Frank will take its place among the classics of the bar. The widespread interest which it has aroused and the diversity of opinion concerning it has made it one of America's greatest *causes célèbres.* The powerful and eloquent argument of Mr. Arnold is well worthy of perusal, and the Classic Publishing Company have performed a service to the profession in presenting it in cheap and convenient form. The pamphlet is prefaced by an introduction written by Mr. Alvin V. Sellers, author of "Great Jury Trials."

"Oratory: Its Requirements and Its Rewards." By John P. Altgeld. (The Public, Ellsworth Bldg., Chicago.) 50 cents.

A short time before he died, the first edition of Governor John P. Altgeld's "Oratory" was published. Although it was immediately recognized (by the few) as the best treatise of its kind ever published, and although this first small edition very soon sold out, a second was not printed, and, through a strange oversight, the book became almost forgotten, except by the few who owned much-prized copies.

The editors of The Public dug it out of obscurity in the fall of 1913 and reprinted it in The Public. Again it met with immediate success. Now they have again put it in book form. It is well printed on good paper, bound in cloth. It is written for the man or woman who has something to say and wants to know how to say it effectively in public.

"The Art of Public Speaking." By J. Berg Esenwein and Dale Carnagey (The Home Correspondence School, Springfield, Mass.) $1.75;

"The Art of Story Writing." By J. Berg Esenwein and Mary Davoren Chambers (The Home Correspondence School, Springfield, Mass.) $1.35 postpaid;

"The Technique of the Mystery Story." By Carolyn Wells, edited with introduction by J. Berg Esenwein (The Home Correspondence School, Springfield, Mass.) $1.62.

Doctor J. Berg Esenwein, after nine years' service as editor of Lippincott's Magazine, and five years as literary adviser to the J. B. Lippincott Company in its book-publishing business, has now devoted himself exclusively to conducting the literary courses given by the Home Correspondence School of Springfield, Massachusetts. It is his purpose to finish a complete series of practical books dealing with the art and craft of authorship in all its many branches. Among the volumes already issued by the Home Correspondence School are the three whose titles appear above. They have published in addition "Writing the Short Story," "The Art of Versification," and "Writing the Photoplay;" while other subjects are in preparation.

In "The Art of Public Speaking," Dr. Esenwein contends that methods are secondary matters; that the full mind, the warm heart, the dominant will, are primary, but believes that experience is not only the best teacher of oratory, but the first and last. This experience, however, must be a dual thing—the experience of others must be used to supplement, correct, and justify the speaker's own experience. Once show a man how to discover and how to captain the team of his life forces—mental, volitional, emotional, physical—and you have given him himself. And that is precisely what "The Art of Public Speaking" aims to do.

In "The Art of Story Writing," a new method of practice and instruction in fiction, rising from the simplest forms up to the modern short story, is presented. It is based on actual experience in teaching the art of story writing to several thousand pupils. The author realizes that the story-telling impulse cannot be taught, for it is a gift; but that the art of narration is a proper subject for instruction. The author points out that in many walks of life the ability to tell a story well will prove to be a valuable attainment.

In "The Technique of the Mystery Story,"

we have a remarkable volume, which is sure to interest. All the world loves a mystery, and every person instinctively feels a call to match his discernment against the problem whenever the mysterious is set before him. Dr. Esenwein points out that for ingenious plot, logical movement, relentless subordination of means to ends, suppression of the irrelevant and unimportant, character contrast, sustained and climacteric interest, and all the qualities that go to make up absorbing narration, the mystery yarn is unsurpassed. It is a fictive game of chess, a story-telling fox chase, a promising literary bass strike—combined.

The volume will be of especial interest to lawyers, and its perusal will tend to develop and perfect those faculties which will assure them success in the unraveling of mysteries and the unmasking of crime.

"The Conservation of Water by Storage." By George F. Swain, Professor of Civil Engineering, Harvard University (Yale University Press, New Haven). $3.00 net, postpaid.

The engineer, the lawyer, the business man, or the legislator, who is interested in any phase of the subject of conservation of water resources, will welcome, as a helpful aid to his studies, Professor Swain's "Conservation of Water by Storage."

Here the expert engineer has applied his talent for construction to problems which traverse the field not only of engineering, but of law and finance. As he points out, the questions of conservation of water by storage cannot be understood or solved, without first appreciating the essence of the controversy over the control of water powers. Therefore, he devotes the first five chapters of his book to these legal phases of the subject.

As applied to water powers, he demonstrates that conservation signifies the greatest and most immediate use possible. Thereby is promoted a triple conservation; for there is saved, not only the waste of unutilized water power, but also waste of fuel, and, in many instances, loss of advantage which would otherwise accrue for navigation uses. He shows that existing legislation, Federal and state, is neither promotive nor regulative of water-power development; but that, on the contrary, it presents unsurmountable obstacles to utilization, and therefore to conservation. A change in legislative policy is the first necessary step to any workable, constructive, or remedial measure. The respective constitutional rights of the Federal government and of the states and of individual owners are clearly set forth. The tendency of the Congress to exceed its constitutional power of control over navigable streams, expressly limited to the regulation of commerce, that is, navigation, is termed "the great stumbling-block" to conservation of water powers. He says:— "Indeed the conservation movement in the past, particularly as regards water powers, has been too much dominated by the idea of enforcing the arbitrary powers of the Federal and state governments, and extending regulation and restriction to their utmost limits. . . . There seems to be throughout this discussion a confusion in the minds of so-called conservationists, between the right that comes from might and legal right or equity."

And he cites the apt remark, recently made by a United States Senator, referring to Federal water-power legislation: "That is the trouble with the present craze for restriction and regulation of private investment in these enterprises. You regulate and restrict to the extent that you have nothing to regulate." Here is the key to the present stagnation of water-power development in this country. Conservation of water power means its use. Lack of use means waste, which can never be recouped. Development means the investment of private capital. But the financier shrinks from investments which are controlled by caprice. Some chance of profit must be vouchsafed, at least the amount of his ultimate investment must be reasonably computable in advance. However extensive, the possible burdens upon capital must be made reasonably definite. It is to accomplish these objects that the water-power measures now pending in the Congress have been drafted; and, for the very reason that the proposed measures, for example, the so-called Shield's bill, make development by private capital possible, the pseudo-conservationists, led by Pinchot, malign both the measure and its sponsors, the Secretary of War and the Senate Committee on Commerce. Professor Swain shows the utter lack of basis for the ultra-Federal-control view. It is the great obstacle to water-power conservation.

Chapter V. treats of water powers on the public domain. Here are pointed out the evils of the present Federal statutes and of the regulations now in force with reference to such water powers. Where the Federal government is riparian owner, it has the rights of riparian owner, beside its paramount right of control of navigation under the commerce clause of the Constitution. Professor Swain does not sufficiently distinguish between public-domain water powers in states retaining the common law of riparian rights and those located in states where the property law has been established of state ownership or of state control. As riparian, the Federal government would have only such rights as are established by the property law of the state in question.

Beginnning with Chapter VI. the author treats of the more technical aspects of conservation of water by storage. He there shows that conservation, that is, saving from waste, can be accomplished by reservoirs and by agriculture. He advocates forestry extension and protection as means of water conservation.

The book is printed in most attractive form, with abundant illustrations and reference matter. Upon both the engineering and the legal problems which are involved in the question of conservation of water resources, this work of Professor Swain will take its place as the leading authoritative discussion.—Rome G. Brown.

"Digest of the Private Corporation, Negotiable Paper and Labor Laws of Louisiana." (Through the Session of 1914.) By Robert H. Marr. $5.00.

"Seymour's New 1915 Kentucky Code, Annotated." Pocket Size. Bible Paper, Flexible Leather Binding. $5.00.

"Washington Digest Supplement, 1915." By Arthur Remington. (Volume 5 of Set) Royal Octavo. Buckram, $10.50.

Recent Articles of Interest to Lawyers

Athletics and Sports.

"Baseball—The Ideal College Game."—Scribner's Magazine, June, 1915, p. 695.

Banks.

"Right of State Banks and Trust Companies to Join Federal Reserve System without Relinquishing Charter Powers."—20 Trust Companies, 415.

"The Law of Banking."—32 Banking Law Journal, 319.

"Modern Banking and Trust Company Methods."—32 Banking Law Journal, 325.

Bills and Notes.

"New Form of Commercial Note Provides for Trust Company Registration."—20 Trust Companies, 422.

Blue Sky Laws.

"The Constitutionality of 'Blue Sky' Laws."—49 American Law Review, 389.

Business.

"Governmental Hostility to Business."—The Fra, June, 1915, p. 49.

"Going After Things."—Everybody's Magazine, June, 1915, p. 712.

"Sticking to the Old Ways."—The American Magazine, June, 1915, p. 36.

Christian Science.

"Legislative Strictures on Christian Science."—19 Law Notes, 45.

Codes.

"The Argentine Civil Code."—1 American Bar Association Journal, 91.

Commercial Law.

"The Evolution of Commercial Law."—1 American Bar Association Journal, 70.

Copyright.

"Are Titles of Books Copyright?"—63 University of Pennsylvania Law Review, 646.

Courts.

"Ultimate Types of Inferior Courts and Judges."—22 Case and Comment, 3.

"Alaska's Inferior Court."—22 Case and Comment, 16.

"A Plea for the Reform of the Inferior Court."—22 Case and Comment, 20.

"Practical Side of Local Inferior Courts of Civil Jurisdiction."—22 Case and Comment, 25.

"The Small Debtor's Court."—22 Case and Comment, 29.

Criminal Law.

"A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases."—63 University of Pennsylvania Law Review, 609, 754.

"Nemo Tenetur Prodere Seipsum."—9 Bench and Bar, N. S., 530.

Debtor and Creditor.

"The Small Debtor's Court."—22 Case and Comment, 29.

Descent and Distribution.

"Murderer Taking under Will or by Inheritance."—80 Central Law Journal, 363.

Electricity.

"The Age of Electricity."—The Fra, June, 1915, p. 34.

Engineering.

"The Age of the Engineer."—The Fra, June, 1915, p. 46.

"Imprisoned Beneath the Sea."—The Wide World, June, 1915, p. 139.

Equality.

"The Equality of Man."—22 Case and Comment, 52.

Evidence.

"The Photograph as Evidence."—19 Law Notes, 46.

"Evidential Quality and Capacity."—80 Central Law Journal, 399.

Exchanges.

"Influence of World War on Foreign Exchanges."—20 Trust Companies, p. 430.

Execution.

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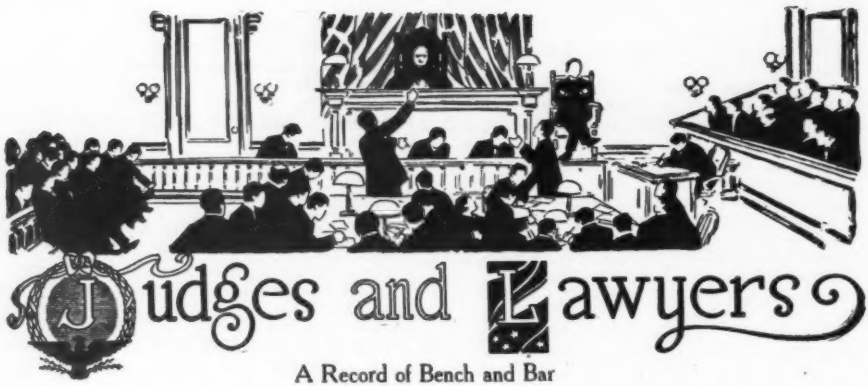
The Independence of the Judiciary

The independence of the judiciary is one of the essential features of the Constitution and has had vast influence in the development of our national integrity and permanence.

Montesquieu said: "There is no liberty if the judiciary power be not separated from the legislative and executive powers."

Burke declared: "Whatever is supreme in a State ought to have as much as possible its judicial power so constituted as not only to depend upon, but in some sort to balance it. It ought to give security to its justice, against its power." . . .

John Fiske calls it: "The Iliad, the Parthenon or the fifth symphony of Beethoven . . . two complete and well-rounded systems of law, the State law and the Federal law, each with its legislative, its executive and its judiciary, moving one within the other, noiselessly and without friction. It was one of the longest reaches of constructive statesmanship ever known in the world."—From Address by Hon. W. W. Goodrich.



Judges and Lawyers

A Record of Bench and Bar

Chief Justice Walter Clark of North Carolina

An Eminent Jurist Who has Completed His Twenty-fifth Year on the Bench

BY BRUCE CRAVEN

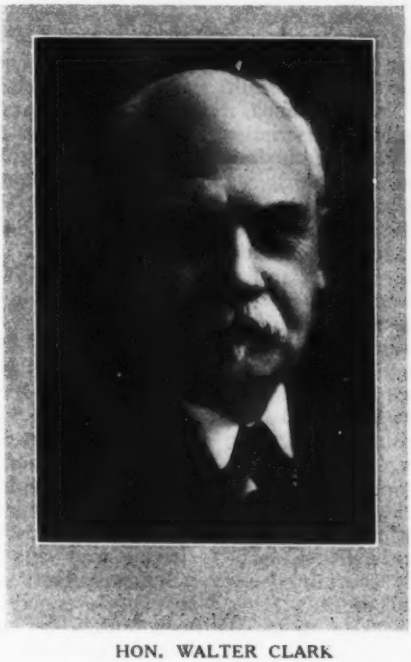
Of the Trinity (N. C.) Bar; Member of American Bar Association; Author of work on "Torrens Title System"

AMONG all the definitions of genius, no one carries with it a clearer conviction of accuracy than Southey's belief that "the three indispensables are understanding, feeling, and perseverance." Add to this the observation of Coleridge that one of the marks of genius is that it carries the spirit of youth into manhood, and analyze and elaborate this combined definition and there would be succinctly portrayed the life and character of Walter Clark, Chief Justice of the supreme court of North Carolina, who, on the 15th day of November, 1914, completed his twenty-fifth year on the bench of the supreme court of his state.

They who lament the lack of progressiveness in the judiciary, or claim that it fails to fulfil the Constitutional requirement "for the establishment of justice," should be able to obtain illimitable comfort from the life and work of this man, who very nearly states his own general attitude in a recent utterance: "It is not for us to bivouac always by the abandoned camp-fires of more progressive communities." His whole record shows him an unswerving friend of justice in the sense of a "constant and prevailing desire to give to every man his due." The statistics in his life are brief because his labors, though immense quantitatively and qualitatively, are labors of the mind. He probably has written as many court opinions as any jurist who ever lived.

Walter Clark was born on a farm in Halifax county, North Carolina, August 19, 1846. At the age of fifteen he entered the Confederate Army, was promoted for courage in action, was wounded in battle, left the army a lieutenant colonel, completed his studies at the University of North Carolina, and was admitted to the bar in 1868, the year from

which dates the present Constitution of the state. As a lawyer he was a student and a scholar, and intensely interested in public affairs in those days that tried men's souls even more than did the years of actual warfare. He made himself known by public denouncement of some of the political corruption and mismanagement, and in 1884 was appointed by Governor Scales to fill a vacancy on the superior court bench. As a superior court judge, under the rotation system requiring him to travel into every county of the state, he was known not only as a terror to evildoers but to the sinners by way of omission as well. Wherever any county official was lax in his official duties, something was sure to happen. He was businesslike, systematic, efficient. He never failed to open court on the exact minute, and he required the same high standard of others. November 16, 1889, he was appointed by Governor Fowle to fill a vacancy on the supreme court bench. He has thus been a judge for thirty consecutive years, twenty-five of which were on the supreme court, and in all that time has been regularly at his place. His career would seem to define genius as a plain, ordinary, everyday business of hard labor and plenty of it.



HON. WALTER CLARK

In 1890, Justice Clark was elected by the people to the position to which he had been appointed, and he has been elected regularly since. The six years closing the nineteenth century were years of political confusion in North Carolina. The Populists and Republicans had come together in an amalgamation known as the Fusionists, and Judge Clark was almost the only Democrat left in office. The Fusionists made no effort to defeat him because they knew it could not be done, but for this he was attacked in the house of his friends and charged with being too friendly to the enemy. They called him a Populist, a Socialist, and other terrible things because of his extreme positions for the general public as against the railroads and other corporations. In 1902 he was the Democratic candidate for chief justice and was opposed by an Independent Democrat backed by the Republicans and powerful commercial interests. The fight made on him was a bitter one. His majority was 63,000, the largest ever given to any state officer in a contest, and since then there has been a firmly established, if undefined and unwritten law that he is and of right ought to be the chief justice of North Carolina. During these years of intense application to his regular duties, he has done much work of other kinds. He edited the five volume History of North Carolina Regiments in the War Between the States, and seventeen volumes of the North Carolina State Records. He translated from the French Constant's Memoirs of Napoleon in three volumes, and his notes in this work show his mastery of the French language and likewise of Napoleonic literature. He is the author of an annotated Code of Civil Procedure, and of a vast number of brief treatises on topics of law and public affairs. His ad-

dresses and written contributions are frequent and never fail to excite comment and discussion. His court opinions as well as these more popular articles have been cited and written about not only in other states of the Union, but in foreign countries. Wherever the English language is spoken his name is known and honored among forward-looking, thinking men and women.

To attempt to present any account of his work as a jurist is extremely difficult. In so far as it affects North Carolina, it might be well expressed by the inscription to the architect of St. Paul's Cathedral: *"Si monumentum requiris, circumspice."* His influence on the legislation and life of his state has not been exceeded by that of any other man of this generation. Blot out his work and North Carolina would be set back in every phase of economic and legal progress. His liberal views and his conservative position have made him cordially hated by all who hate to see the law keep pace with the march of civilization. His own state has not been progressive in legislation, and often his powerful dissenting opinions have aroused the people to enact them into law. Particularly in the matter of the rights of women under the law he has fought a remarkable battle. On this subject the North Carolina court has been the most backward of all courts and has never rendered a decision in favor of women. He has been subjected to the fiercest kind of antagonism within and without the state, and his victory over it brings to mind the words of Erskine in behalf of Stockdale: "Genius breaks from the fetters of criticism, but its wanderings are sanctioned by its majesty and wisdom when it advances in its path."

Goethe said: "If you would be eloquent, be honest;" and someone has said: "The test of originality is not novelty, but sincerity." Measured by either or both, Chief Justice Clark stands high. His learning in the law is profound and thorough, and yet he is accused of violating the ancient landmarks in favor of the fads of the times. The truth is that he is clearly set apart from that type of lawyer or jurist whose law is based on the *"statute de donis conditionalibus"* and whose law goes not back of that and comes not beyond it. Justice Clark goes to the fountain head of law in the inherent demand for human justice, or, as Von Ihering calls it, "the courageous and constant exercise of the feeling of right," and his belief is that modern conditions and the primary purpose of law are together in demanding that the mistakes of ancient kings and repudiated forms of government shall be corrected

Aside from his legal knowledge, his two conspicuous characteristics are his honesty and his intellect. His character is a clear beacon light to every lawyer who knows him and whose desire is to honor the profession. With all his power of mind and position and scholarship, there continues to shine through his every act the unmistakable spirit of youth that believes in the average man, the striving man, and that therefore places individual liberty and protection as the basis of law. He never learned to say something he did not think. While small men dodge behind the breastworks of policy to escape the changes they know are coming, Walter Clark calmly takes his stand and bears the shock of battle. He knows the letter of law as few men do, but he never loses sight of the spirit of the maxim: *"Quorsum enim sacrae leges inventae et sancitae fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur."* The mark of his superiority is his equality.

Laughter makes good blood.—Italian Proverb

Long Range. Two country darkies listened, awe-struck, while some planters discussed the tremendous range of the new German guns.

"Dar now," exclaimed one negro, when his master had finished expatiating on the hideous havoc wrought by a forty-two-centimeter shell, "jes' lak I bin' tellin' yo' niggehs all de time! Don' les' have no guns lak dem roun' heah! Why, us niggehs could start runnin' erway—run all day, git almos' home free, an' den git kilt jus' befo' suppeh!"

"Dat's de trufe," assented his companion, "an' lemme tell yo' sumpin' else, Bo. All dem guns needs is jus' yo' *ad*-dress, dat's all; jes' giv'em de *ad*-dress, an' they'll git yo'."—Everybody's Magazine.

Disappointed. Little Elsie, aged five, was quietly playing on the porch one afternoon, while her father and one of his friends were enjoying a smoke and having a chat on political matters. They paid no attention to the little girl's presence, and Elsie seemed wholly absorbed in her dolls.

That evening Elsie appeared to be unusually silent and thoughtful. When bedtime came, and she knelt down to say her prayers, there came the usual petitions, and then, with a slight pause, she resumed in a very earnest manner:

"And now, God, please take good care of Yourself, for if anything should happen to You, we should only have Mr. Wilson,—and he hasn't come up to father's expectations." — Philadelphia Ledger.

When the Laws Met. The Laws sat about the long green table. All the fundamentals were there save one. Even the decrepit Salic Law was present, dozing between the Mosaic Laws and the Law of Primogeniture.

The Chairman of the Law of the Land called the meeting to order.

"Are we all present?" he asked.

It was the Blue Laws who responded.

"I don't see nothin' of the Law o' Nations," he squeaked.

"The Law of Nations has been abolished," the chairman sharply replied. "The business of the convention will now proceed."—Cleveland Plain Dealer.

Unbleachable. "If some of these financiers keep telling on one another they'll all end with the character that Cal Clay gave the deacon."

The speaker was Gifford Pinchot. He resumed:

"Cal Clay was a witness in behalf of the deacon, who was up for chicken stealing.

"'Calhoun, my man,' the lawyer said, 'what do you know of the deacon's character?'

"'Hit am unbleachable, sah,' Cal replied."—Washington Star.

Mutual Help. "Say, old man," quoth the farmer, "I wish you'd train my son to be a lawyer in your office. There's nothing in farming."

"I'll do it," assented the lawyer, "provided you'll take my son on your farm. There's nothing in the law."—Kansas City Journal.

An Ambiguous Apology. A young practitioner appeared before a pompous old judge, who took offense at a remark the lawyer made criticizing his decision.

"If you do not instantly apologize for

that remark," said the judge, "I shall commit you for contempt of court."

"Upon reflection, your Honor," instantly replied the young attorney, "I find that your Honor was right and I was wrong, as your Honor always is."

The judge looked dubious, but finally said he would accept the apology.—Kansas City Times.

In An Agreeable Strain. Mrs. Exe —"Did the lawyer for the defense submit you to a cross-examination?"

Mrs. Wye—"No indeed; he was just as pleasant about it as he could be."—Detroit Free Press.

Filial Admiration. Supper was in progress, and the father was telling about a row which took place in front of his store that morning: "The first thing I saw was one man deal the other a sounding blow, and then a crowd gathered. The man who was struck ran and grabbed a large shovel he had been using on the street, and rushed back, his eyes blazing fiercely. I thought he'd surely knock the other man's brains out, and I stepped right in between them."

The young son of the family had become so hugely interested in the narrative as it proceeded that he had stopped eating his pudding. So proud was he of his father's valor, his eyes fairly shone and he cried:

"He couldn't knock any brains out of you, could he, father?"

Father gasped slightly and resumed his supper, but the lad's countenance was frank and open.—Lippincott's.

Why Should He. A military class was standing for examination when the supervising lieutenant called upon a young student.

"Answer this, Isaac," he said. "Why should a soldier fight for his country, and even sacrifice his life for it?"

"Right you are, lieutenant," replied Isaac. "Why should he!"—Minneapolis Journal.

Ready to Oblige. A Texas sheriff visiting New York to take a prisoner back to the South was turned over to an inspector who was to be his amusement guide. They wound up at an East End ball, where they were a few dips present.

After a half hour the inspector called one of the crooks to one side and said:

"See that tall man with the sombrero?"

"Yes, what about him?"

"He's a Texas bull I'm showing around, and I think it would be a fancy idea if you could nick him for his ticker."

"Nix, you're trying to put me in bad."

"Nothing like it,—purely a joke, that's all. To show you I'm on the level I give you my word that you won't get in trouble, and I'll give you a $5 note for his watch."

"All right; here it is."—Chicago Post.

A Particular Jury. Some time ago there was a homicide case in a Western court, in which there was considerable doubt as to the guilt of the accused. The trial judge seemed to share the popular belief.

"Gentlemen of the jury," said he, in concluding his charge, "if the evidence in your minds shows that pneumonia was the cause of the man's death, you cannot convict the prisoner."

Whereat the jury retired and in about ten minutes the constable returned and presented himself before the judge.

"Your Honor," he remarked, "the gentlemen of the jury want some information."

"On what point of evidence?" asked the judge.

"None, judge," was the rejoinder of the constable. "They want to know how to spell 'pneumonia.'"

Full Particulars. The prosecuting witness in the damage suit against the city was giving in his testimony.

"Now, then, Mr. Bleedem," said his lawyer, "you will please tell the jury where you were injured."

"On my knee, in my feelings, and right in front of the city hall," rapidly answered the witness, fearing an objection on the part of the other attorney.

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